163 U.S. 160

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1895.**

No. 273.

WILLIAM PEREGO, APPELLANT,

*vs.*

W. H. DODGE, E. P. FERRY, A. B. RICHARDSON, J. N. JACOBSON, MARTIN McGRATH, AND Mrs. MARTIN McGRATH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

**FILED SEPTEMBER 21, 1893.**

**(15,394.)**

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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a *Transcript.*

Supreme Court of Utah.

WILLIAM PEREGO, Appellant,
*vs.*
WM. H. DODGE *et al.*, Respondents. } File No. 321.

Filed in the supreme court Nov. 25, 1892, at Salt Lake City, Utah.
JOS. P. BACHE, *Clerk.*

1 TERRITORY OF UTAH, *Salt Lake County,* } *ss:*

In the District Court, Third Judicial District.

WILLIAM PEREGO, Plaintiff,
*vs.*
W. H. DODGE, E. P. FERRY, A. B. RICHARDSON, J. N. Jacobson, Martin McGrath, and Mrs. Martin McGrath, Defendants. } Complaint.

The plaintiff above named complains of the above defendants, and alleges and shows to the court that the plaintiff is and was at all times hereinafter mentioned a citizen of the United States.

That prior to the tenth day of December, 1889, the plaintiff was and ever since has been and now is the owner (subject only to the paramount title of the United States) and in the possession and entitled to the possession of that certain mine and mining claim, containing a lode of rock in place bearing silver and other precious metals, situate in Uintah mining district, Summit county, and Territory of Utah, called the "Perego" mining claim, and more particularly described, with magnetic variation at 16 degrees and 30 minutes east, as follows:

Commencing at the discovery of said Perego lode and mining claim, and running thence north 67 degrees 30 minutes east 44 feet to a point on the easterly end line thereof, adjoining the westerly end line of the Tenderfoot Lode patented claim, lot No. 255; thence south 24 degrees 15 minutes east 149.1th feet to post No. 1, the point of commencement of exterior bounds of the claim; thence
2 along its southern side line south 67 degrees 30 minutes west 1,500 feet to post No. 2; thence along its western end line north 24 degrees 15 minutes west 449.2 feet to post No. 3; thence along its northern side line north 67 degrees 30 minutes east 1,500 feet to post No. 4; thence along its eastern end line, adjoining the western end lines of Virginia, Woodside Extension, and Tenderfoot Lodes patented claims, lots Nos. 258, 254, and 255 respectively, south 24 degrees 15 minutes east 449.2 feet to said post No. 1, the place of beginning of surface bounds by side of post No. 2 of said Tenderfoot lode, lot No. 255, and location stake of said Perego Lode claim, containing 15.461 acres. From Post No. 4 the United States

mineral monument No. 9, in said Uintah mining district, bears north 27 degrees 25 minutes east 383.8 feet distant.

That the defendants, claiming to be the owners of an alleged adjacent mining claim, called the "Consolidated claim of Wm. H. Dodge *et al.*," upon what is commonly known as the May Flower group of lode mining claims, consisting of the following-named lode locations consolidated into one mining claim, namely, the Ladies' Drum No. 1, lot No. 609; the Ladies' Drum No. 2, lot No. 610; the Ladies' Drum No. 3, lot No. 611; the May Flower No. 1, lot No. 612; the May Flower No. 2, lot No. 613; the May Flower No. 3, lot No. 614; the May Flower No. 4, lot No. 615; the May Flower No. 5, lot No. 616; the May Flower No. 6, lot No. 617; the May Flower No. 8, lot No. 618; the Sheridan, lot No. 637; the Majorie, lot No. 641, and the Equinoctial, lot No. 642, on or about the eighteenth to thirtieth days of March, A. D. 1889, wrongfully caused said alleged "Consolidated claim of William H. Dodge
3 *et al.*," and consisting of the aforesaid locations, to be so surveyed as to cross upon and overlap the said Perego mining claim and lode and include a portion thereof in said alleged May Flower No. 4 Lode location, lot No. 615, the same being one of the locations included in the said "Consolidated claim," described, with magnetic variation at 16 degrees 30 minutes east, as follows:

Commencing at post No. 3 of the official survey of said May Flower No. 4 Lode location, lot No. 615, and running thence along the southern side line thereof south 67 degrees 30 minutes west 1,114 feet to post No. 4 of said May Flower No. 4 location; thence north 8 degrees 30 minutes west 50.5 feet to a point on the northern side line of said Perego Lode mining claim north 67 degrees 30 minutes east 306.3 feet from post No. 3, at northwest corner thereof; thence along northern side line of said Perego Lode claim north 67 degrees 30 minutes east 1,114 feet to a point south 67 degrees 30 minutes west 79.7 feet from post No. 4, at northeast corner thereof; thence south 8 degrees 30 minutes east 50.5 feet to the place of beginning, containing 1.253 acres; and also so as to include a further and additional portion of said Perego mining claim in said alleged May Flower No. 5 Lode location, lot No. 616, the same b-ing included in said "Consolidated claim," described, with magnetic variations at 16 degrees 30 minutes east, as follows: Commencing at post No. 1 of the official survey of said May Flower No. 5 Lode location, lot No. 616, and running thence south 67 degrees 30 minutes west 1,071 feet to post No. 2 thereof; thence north 38 degrees 50 minutes west 208.4 feet to post No. 3 thereof;
4 thence north 67 degrees 30 minutes east 43 feet from post No. 4 of said May Flower No. 4 location, lot No. 615; thence along the line between said May Flower No. 4 and May Flower No. 5 Lode locations, lots Nos. 615, 616, north 67 degrees 30 minutes east 1,071 feet to posts Nos. 3 and 4 of said locations respectively; thence south 38 degrees 50 minutes east 208.4 feet to the place of beginning, containing 4.917 acres. From post No. 4 of said May Flower No. 5 location northwest corner post No. 4 of said

Perego Lode claim bears north 9 degrees 27 minutes east 104.14 feet distant.

That on or about the tenth day of December, 1889, the defendants filed the field-notes and a diagram of said survey of the alleged "Consolidated claim of Wm. H. Dodge *et al.*" and including all of the aforesaid mining locations, and also an application for a United States patent for said mining claims, in the United States land office at Salt Lake City, Utah Territory, and caused the register of said land office to give notice of said application for a patent by publication, as required by law; that in and by said application for patent the defendants wrongfully set up and alleged that they were the owners and in the possession of the whole of the alleged "Consolidated claim of Wm. H. Dodge *et al.*," including the said May Flower claims Nos. 4 and 5, being lots Nos. 615 and 616 respectively, inclusive of the premises last above described and the lodes therein, part of the said Perego mining claim and lode, and the property *and* in possession of the plaintiff.

That the plaintiff during the sixty days' period of publication of the notice of application for patent for said alleged "Consoli-
5 dated claim of Wm. H. Dodge *et al.*" filed in said land office under oath a protest and adverse claim to said application and for said last-described premises and the lode therein in due form and showing the nature, extent, and boundaries of the adverse claim of the plaintiff, and thereupon proceedings on said application in said land office were and are stayed to await the determination by a court of competent jurisdiction of the right of possession to said last-described premises and the rights of the respective parties therein and thereto, and to that end the plaintiff brings this suit, the period of 30 days not having elapsed since the filing of said protest and adverse claim.

That defendants maintain and prosecute said application for patent for the alleged Consolidated claim of Wm. H. Dodge *et al.*, and thereby the title and possession of plaintiff in and to the last above described premises, being the area thus brought in conflict between the said Perego mining claim and the alleged Consolidated claim of Wm. H. Dodge *et al.* mining claim, are wrongfully impeached, clouded, and encumbered and the value of the plaintiff's estate and property therein greatly depreciated, to his great damage.

The plaintiff therefore prays judgment and relief against the defendants.

That the plaintiff is the owner and lawfully in and entitled to the possession of the last above described premises, the area in conflict between the said Perego mining claim and the alleged Consolidated claim of Wm. H. Dodge *et al.* upon alleged May Flower No. 4 and May Flower No. 5 Lode locations and the lodes therein and quieting and confirming plaintiff's title thereto and possession thereof.

6 That the defendants have no title to or right of possession of said conflict area or the lodes therein or any part thereof.

That the defendants be restrained pending the action and upon trial perpetually from entering in or upon said conflict area or the

lodes thereon or any part thereof or mining in or extracting any ores or minerals therefrom, and from in any way interfering with the possession thereof; also that the plaintiff have all other and further proper relief, with costs of suit.

P. L. WILLIAMS,
*Plaintiff's Attorney.*

TERRITORY OF UTAH, } ss:
*Salt Lake County,* }

P. L. Williams, being duly sworn, says he is the attorney of the said plaintiff and makes this verification on his behalf and for the reason that the said plaintiff is absent from the said county where affiant resides. Affiant further says that he knows the contents of the foregoing complaint; that said complaint is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

P. L. WILLIAMS.

Subscribed and sworn to before me this March 4th, 1890.

[SEAL.] WALDEMAR VAN COTT,
*Notary Public.*

Endorsed: # 8334. Title court and cause. Complaint. Filed March 4, 1890. Henry G. McMillan, clerk. Issued March 4, 1890.

7 In the District Court of the Third Judicial District of Utah, County of Salt Lake.

WILLIAM H. PEREGO, Plaintiff,
*vs.*
W. H. DODGE, E. P. FERRY, A. B. RICHARDSON, J. N. Jacobson, Martin McGrath, and Mrs. Martin McGrath, Defendants. } Answer.

The defendants, answering the complaint, deny—

That the plaintiff is the owner of the said Perego lode or mining claim described in the complaint or was ever seized or possessed or entitled to the possession of the said lode or mining claim or any part thereof.

Further answering, defendants deny that the pretended Perego lode or mining claim was ever duly located or located at all or that it ever became a valid mining claim.

Deny that said claim was ever located upon unsurveyed or unappropriated lands of the United States.

Deny that the said pretended claim has ever been kept alive or the work done on it.

Deny that the defendants, claiming to be the owners of an adjacent mining claim, called the Consolidated claim of William H. Dodge *et al.*, or otherwise or at all, on or about the — day of —— or at any other date, wrongfully or otherwise or at all caused said mining claim to be so surveyed as to cross upon or overlap the said

Perogo mining claim or lode or include any portion of either of them.

8 Deny that the said so-called conflict area on premises described in the complaint or the lode therein or any part of the same is a part of the said Perego lode or mining claim, or that the same were ever the property of the plaintiff, or that the plaintiff was ever seized or possessed or in the possession of said conflict area or any part thereof or ever had any interest or estate therein, and deny that by the maintenance or prosecution of said application for patent for said Consolidated claim of W. H. Dodge *et al.* lode and mining claim the title or possession of plaintiff in or to said last above described and bounded premises, said conflict area, is wrongfully impeached, clouded, or encumbered or the value of the plaintiff's estate or property therein greatly depreciated *or* to his great or any damage.

Deny that the said plaintiff is the owner or entitled to the possession of any part or parcel of said premises described as being the said pretended mining claim called the Perego, or any part of the said ground alleged to be in conflict with the application of defendants for patent.

Defendants on information and belief deny that during the 60 days' period of the publication of notice of application for patent of the Consolidated claim of W. H. Dodge *et al.* for the defendants, and mining claims filed in the land office, that the plaintiff did file any protest or adverse claim to the said application, either in due form or otherwise.

And in like manner defendants deny that the plaintiff ever brought this action within the period of thirty days after filing such protest or adverse claim.

9 And the defendants, further answering the complaint, allege that the defendants were at the commencement of this action and for a long time prior thereto had been the owners in possession and entitled to the possession (subject only to the paramount title of the United States) of all the mining claims mentioned in the said Consolidated claim for patent, and were the owners of the said mining claims described and mentioned in the complaint as the May Flower No. 4 and the May Flower No. 5.

That the said May Flower No. 4 is a mining claim containing a lode or vein of rock in place bearing silver and other metals, situate in Uintah mining district, Summit county, Utah Territory, and bounded and described as follows, to wit:

Commencing at post No. 1, a corner of the claim, and running thence north 67 degrees 30 min. E. 1,114 feet to post No. 2, from which U. S. min. monument No. 9 bears N. 39 deg. 24 min. E. 327.*L* feet distant; thence south 8 deg. 30 min. E. 206.1 feet to post No. 3; thence south 67 deg. 30 min. W. 1,114 feet to post No. 4; thence north 8 deg. 30 min. W. 206.1 feet to post No. 1, the place of beginning. From post No. 1 the discovery point of the claim bears south 8 deg. 30 min. E. 103.05 feet distant.

That the said May Flower No. 4 mining claim was duly located on or about the 16th day of June, 1886, according to the laws of

the United States under the rules and customs of the Uintah mining district; that the assessment-work required by law has been fully performed, and that the said May Flower No. 4 is now a valid mining claim.

And these defendants, further answering, allege that the May Flower No. 5 is a mining claim containing a lode or vein of rock in place bearing silver and other metals, situate in Uintah mining district, Summit county, Utah, and bounded and described as follows, to wit:

Commencing at post No. 1, a corner of the claim, and from which U. S. min. monument No. 9 bears north 4 deg. 18 min. E. 620.7 feet distant; running thence south 67 deg. 30 min. W. 1,071 feet to post No. 2, thence north 38 deg. 50 min. W. 208.4 feet to post No. 3, thence north 67 deg. 30 min. E. 1,071 feet to post No. 4, thence south 38 deg. 50 min. E. 208.4 feet to post No. 1, the place of beginning. From post No. 1 of said claim the discovery point bears north 38 deg. 50 min. W. 104.2 feet distant.

That the said May Flower No. 5 mining claim was duly located on or about the 31st day of May, 1886, according to the laws of the United States under the local rules and customs of the Uintah mining district; that the assessment-work required by law has been fully performed, and that the said May Flower No. 5 is now a valid mining claim.

That the said conflict area set forth in the said complaint is a part of the said mining claims, to wit, the May Flower No. 4 and the May Flower No. 5, and the property of the defendants.

Wherefore defendants pray judgment that the defendants be adjudged to be the owners and entitled to the possession of the said May Flower No. 4 and May Flower No. 5 lodes and mining claims, including said conflict area, for all general and proper relief, and for costs of suit.

ARTHUR BROWN,
*Attorney for Defendant-.*

TERRITORY OF UTAH, }
*County of Salt Lake,* } *ss:*

E. P. Ferry, being first duly sworn, deposes and says that he is one of the defendants in the foregoing action; that he has read the answer in said action and knows the contents thereof; that it is true of his own knowledge except as to those matters alleged on information and belief, and as to those matters he believes it to be true.

EDWARD P. FERRY.

Subscribed and sworn to before me this 13th day of March, 1890.
[SEAL.] FRED. E. BARKER,
*Notary Public.*

Endorsed: # 8334. Title court and cause. Answer. Filed March 14, 1890. H. G. McMillan, clerk, by Ferg. Ferguson, deputy. Arthur Brown, attorney for defendants.

In the District Court for the Third Judicial District of Utah Territory.

WILLIAM PEREGO, Plaintiff,
*vs.*
WM. H. DODGE *et al.*, Defendants.

This cause *coming* on regularly for trial at this time and P. L. Williams, Esq., attorney for the plaintiff, and Messrs. Bennet, Marshall & Bradley, Arthur Brown, and W. H. Dickson, attorneys for defendant, are present and ready for trial and the case is tried before the court. William Perego, Charles Barnicott, Robert Gorlinski,
J. T. Robinson, and Mr. Clark are sworn and testify on be-
12 half of the plaintiff.

George Tate, J. H. Farrish, Geo. Barry, Dr. E. P. Le Compte, Martin McGrath, Samu*le* Harwell, John Clawson, and Mr. Stute are sworn and testify on behalf of the defendants, and the further trial is adjourned until tomorrow.

Dated May 6, 1891.

In the District Court of the Third Judicial District of Utah Territory.

WILLIAM PEREGO, Plaintiff,
*vs.*
WM. H. DODGE *et al.*, Defendants.

The attorneys for parties are present, and the trial herein is resumed. Charles L. Street is sworn an- testifies as a witness on behalf of the plaintiff. Martin McGrath, J. N. Jacobsen, C. P. Brooks, A. Jensen, Lawrence Wilson, O. A. Palmer, Mr. De Hoff, Mr. Tensch, and Wm. H. Colbath are sworn and testify as witnesses on behalf of the defendants, and the evidence closes and the further trial herein is adjourned.

Dated May 7th, 1891.

13 In the District Court for the Third Judicial District of Utah Territory.

WILLIAM PEREGO, Plaintiff,
*vs.*
WM. H. DODGE *et al.*, Defendants.

This case is further heard and tried upon the final arguments of P. L. Williams, Esq., for the plaintiff, and W. H. Dickson and Arthur Brown for the defendants, and the case, being submitted, is taken under advisement by the court.

Dated May 9th, 1891.

In the District Court for the Third Judicial District of Utah Territory.

WILLIAM PEREGO, Plaintiff,
*vs.*
WM. H. DODGE *et al.*, Defendants.

This case having been heretofore tried and submitted to the court and the court, being now fully advised, finds the issues for the defendants, and it is ordered that decree be entered herein in favor of the defendants and against the plaintiff and quieting and confirming the title of the defendants to the area in conflict herein, and plaintiff is allowed 30 days' stay and the same time to file notice of motion and statement on motion for new trial.

Decree entered in Judgment Book "I."

Dated May 11th, 1891.

14 UTAH TERRITORY, *Salt Lake County,* } *ss:*

In the District Court of the Third Judicial District.

WILLIAM PEREGO, Plaintiff,
*vs.*
W. H. DODGE *et al.*, Defendants. } No. 8334.

This cause duly coming on for trial on the merits before the court without a jury, and the court having heard the pleadings, evidence, and arguments of the respective counsel, the court now makes and files the following findings of fact and conclusions of law:

1. That on June 16, 1886, J. N. Jacobsen, then a citizen of the United States, entered upon and explored the premises hereinafter described as the Mayflower No. 4 Lode mining claim, situated in Uintah mining district, Summit county, Utah Territory, discovered therein a vein or lode of rock in place bearing valuable mineral, and located the same as and for a mining claim, and called the same the Mayflower No. 4 mining claim; that in making said location said locator conspicuously posted at the discovery point on said lode a notice of location in writing containing the name of the locator an- of the claim, the date of the location, and such a description of the claim by reference to natural objects and permanent monuments in the vicinity as that therefrom the claim could be readily identified and found; that said locator also marked the corners and boundaries of the claim with stakes and monuments of proper dimensions so that therefrom such boundaries could be readily
15 identified, traced, and found on the ground.

And said locator afterwards, to wit, on June 21, 1886, filed for record in the office of the recorder of said mining district a copy of said location notice, where the same was recorded and is of record in Book I of Locations, at page 298 of the mining records of said mining district.

2. That during and for each of the years 1887, 1888, and 1889

said locator and his subsequent grantees did and performed on and for the benefit of said Mayflower No. 4 Lode mining claim one hundred dollars' worth of work and improvements as and for the annual work and improvements required by law, and that said work and improvements tended directly to the development of said mining claim.

3. That by a chain of mesne conveyances the title to said lode mining claim was at the time of the application for patent described in the complaint and at the time of the commencement of this suit and is now vested in the defendants.

4. That on May 31, 1886, Mistress Martin McGrath and J. N. Jacobsen, each of whom was then a citizen of the United States, entered upon and explored the premises hereinafter described as the Mayflower No. 5 Lode mining claim, situated in Uintah mining district, Summit county, Utah Territory, discovered therein a vein or lode of rock in place bearing valuable minerals, and located the same as and for a mining claim and called the same the Mayflower No. 5 Lode mining claim; that in making said location said locators conspicuously posted at the discovery point of said
16 claim a notice of location in writing containing the names of the locators and of the claim, the date of the location, and such a description of the claim by reference to natural objects and permanent monuments in the vicinity as that therefrom the claim could be readily identified and found; that said locators also marked the corners and boundaries of the claim with stakes and monuments of proper dimensions so that therefrom such boundaries could be readily identified, traced, and found on the ground.

And said locators afterwards, to wit, on June 8th, 1886, filed for record in the office of the recorder of said mining district a copy of said location notice, where the same was recorded and is of record in Book I of Locations, at page 278 of the mining records of said district.

5. That during and for each of the years 1887, 1888, and 1889 said locators and their subsequent grantees did and performed on and for the benefit of said Mayflower No. 5 Lode mining claim one hundred dollars' worth of work and improvements as and for the annual work and improvements required by law, and that said work and improvements tended directly to the development of said mining claim.

6. That by a chain of mesne conveyances the title to said mining claim was at the times of the application for patent described in the complaint and at the time of the commencement of this suit and is now vested in the defendants.

7. That on May 31st, 1886, Mistress Martin McGrath and J. N. Jacobsen, both of whom were then citizens of the United States, entered upon and explored the premises hereinafter described as the Mayflower No. 7 Lode mining claim, situated in Uintah mining district, Summit county, Utah Territory, discovered
17 therein a vein or lode of rock in place bearing valuable minerals, and located the same as and for a mining claim and called the same the Mayflower No. 7 mining claim; that in making

said location said locators conspicuously posted at the discovery point on said lode a notice of location, in writing, containing the names of the locators and of the claim, the date of the location, and such a description of the claim by reference to natural objects and permanent monuments in the vicinity as that therefrom the claim could be readily identified and found on the ground, and said locators afterwards, to wit, on June 8, 1886, filed for record in the office of the recorder of said mining district a copy of said location notice, where the same was recorded and is of record in Book I of Locations, at page 279, of the mining records of said mining district.

8. That during and for each of the years 1887 and 1888 said locators and their subsequent grantees did and performed on and for the benefit of said May Flower No. 7 Lode mining claim one hundred dollars' worth of work and improvements as and for the annual work and improvements required by law, and that said work and improvements tended directly to the development of said mining claim.

9. That by a chain of mesne conveyances the title to said lode mining claim was at the time of the application for patent described in the complaint and at the time of the commencement of this suit and is now vested in the defendants.

10. That the Perego Lode mining claim claimed by the plaintiff herein was located September 5th, 1888, by the plaintiff, then
18 a citizen of the United States, and that said claim as located and as surveyed for the protest and adverse claim set forth in the complaint covers and includes the conflict areas particularly described in the complaint; that no valid discovery of said Perego claim was ever made by plaintiff, and said Perego claim was located and the discovery point thereof made and established on said May Flower No. 7 Lode mining claim while said last-named claim was valid and in existence, to wit, on September 5th, 1888.

11. That at the time of the location of said Perego claim the conflict areas described in the complaint, as well as so much of said claim as is included in the Mayflower No. 7 claim aforesaid, were not vacant, unappropriated, or unclaimed mineral lands of the United States.

That the defendants and their grantors did, prior to their application for patent on the Consolidated claim described in the complaint of which said Mayflower No. 4 and Mayflower No. 5 claims constitute a part, five hundred dollars' worth of labor and improvements on each and every lode location embraced in said Consolidated claim, and the defendants were and are entitled to a United States patent for said Consolidated claim, including said two mining claims, the Mayflower No. 4 and the Mayflower No. 5.

That the defendants were prior to their application for patent aforesaid and now are citizens of the United States; that the survey of the Consolidated claim described in the complaint over and upon the Perego mining claim so as to include the conflict areas described in the complaint was rightful; that the defendants
19 did not in or by their said application for patent or other-

wise wrongfully set up or allege that they were the owners or in the possession of the Consolidated claim as aforesaid, including the said Mayflower No. 4 and May Flower No. 5 claims, nor did they in that way or in any other way wrongfully set up or allege that they were the owners or in the possession of the whole or any part of the conflict areas described in the complaint.

12. By the maintenance and prosecution of the defendants' application for patent no title or possession of plaintiff in or to the conflict areas in the complaint described or in or to any part of said conflict areas were wrongfully impeached, clouded, or encumbered or the value of any estate or property of plaintiff therein greatly or at all depreciated, to his great damage or to his damage at all; that the plaintiff had not prior to the institution of this suit and has not any right, title, or interest in or to said conflict area or in or to any part of either of said conflict areas; that prior to the institution of this suit the defendants were and are the owners an- in and entitled to the possession of the whole and every part of the said Consolidated claim, including the said May Flower No. 4 and May Flower No. 5 claims, including the conflict areas described in the complaint.

Said May Flower No. 4 claim is described, with magnetic variation of 16 deg. 30 min. east, as follows, to wit:

Commencing at post No. 1, a corner of the claim, and running thence north 67 degrees 30 min. east 1,114 feet to post No. 2, from which U. S. mineral monument No. 9 bears north 39 deg. 24 min. east 327.1 feet distant, thence south 8 deg. 30 min. east 206.1 feet to post No. 3, thence south 67 degrees 30 min. west 1,114 feet to post No. 4, thence north 8 deg. 30 min. west 206.1 feet to post No. 1, the place of beginning. From post No. 1 discovery point of the claim bears south 8 deg. 30 min. east 103.05 feet distant.

Said Mayflower No. 5 mining claim is described, with magnetic variation of 16 *ged* 30 min. east, as follows, to wit:

Commencing at post No. 1, a corner of the claim and from which U. S. mineral monument No. 9 bears north 4 deg. 18 min. east 620.7 feet distant, running thence south 67 deg. 30 min. west 1,071 feet to post No. 2, thence north 38 deg. 50 min. west 208.4 feet to post No. 3, thence north 67 deg. 30 min. east 1,071 feet to post No. 4, thence south 38 deg. 50 min. east 208.4 feet to post No. 1, the place of beginning. From post No. 1 of said claim the discovery point bears north 88 deg. 50 min. west 104.2 feet distant.

Said Mayflower No. 7 mining claim is described, with magnetic variation of 16 deg. 30 min. east, as follows:

Commencing at post No. 1, a corner of the claim and running thence north 28 deg. 30 min. west 201.1 feet distant to post No. 2, thence north 67 deg. 37 min. east 1,461 feet to post No. 3, thence south 28 deg. 30 min. east 201.1 feet to post No. 4, and thence south 67 deg. 30 min. west 1,461 feet to said post No. 1, the place of beginning, containing 6.701 acres. From said post No. 3 United States mineral monument No. 9 bears north 4 deg. 44 min. east 612.4 feet distant. From the middle of the westerly end line of the

claim the discovery point bears north 67 deg. 30 min. east 1,300 feet distant.

And as conclusions of law the court finds that the defend-
21 ants are entitled to a decree herein adjudging them to be the owners (subject only to a paramount title of the United States) and in and entitled to the possession of the whole and every part of the said Mayflower No. 4 and Mayflower No. 5 Lode mining claims and as part thereof and belonging thereto the conflict areas described in the complaint and the whole thereof, and adjudging that the plaintiff had not at the time he filed his protest and adverse claim or at any time since and has not now any right, title, or interest in or to said or any part of said conflict areas described in the complaint, and forever enjoining, estopping, and debarring the plaintiff and any and all persons claiming by, through, or under him from at any time setting up any claim of right or title to said or any part of said mining claim or conflict areas, and forever confirming and quieting the defendants' right and title thereto, and awarding the defendants their costs herein as against the plaintiff.

By the court:

C. S. ZANE, *Judge.*

Endorsed: #8334. Title court and cause. Findings. Filed August 18, 1891. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

22 UTAH TERRITORY, } *ss:*
*Salt Lake County,* }

In the District Court of the Third Judicial District.

WILLIAM PEREGO, Plaintiff, }
*vs.* } 8334. Decree.
W. H. DODGE *et al.*, Defendants. }

Findings of fact and of law having been duly made and filed herein, it is now, in accordance therewith—

Adjudged and decreed that prior to and at the commencement of this action the defendants were and still are the owners (subject only to the paramount title of the United States) and in the possession and entitled to the possession of the whole and every part of the May Flower No. 4 and Mayflower No. 5 Lode mining claims, situated in Uintah mining district, Summit county, Utah, particularly described, with magnetic variations of 16 deg. 30 min. east, as follows, to wit:

1*st. Mayflower No.* 4.

Commencing at post No. 1, a corner of the claim, and running thence north 67 deg. 30 min. east 1,114 feet to post No. 2, from which United States mineral monument No. 9 bears north 39 deg. 24 min. east 327.1 feet distant; thence south 8 deg. 30 min. east 206.1 feet to post No. 3; thence south 67 deg. 30 min. west 1,114 feet to post No. 4; thence north 8 deg. 30 min. west 206.1 feet to post No. 1,

the place of beginning. From post No. 1 the discovery point of the claim bears south 8 deg. 30 min. east 103.5 feet distant.

23 *2nd. Mayflower No. 5.*

Commencing at post No. 1, a corner of the claim and from which U. S. mineral monument No. 9 bears north 4 deg. 18 min. east 620.7 feet distant, running thence south 67 deg. 30 min. west 1,071 feet to post No. 2; thence north 38 deg. 50 min. west. 208.4 feet to post No. 3; thence north 67 deg. 30 min. east 1,071 feet to post No. 4; thence south 38 deg. 50 min. east 208.4 feet to post No. 1, the place of beginning. From post No. 1 of said claim the discovery point bears north 38 deg. 50 min. west 104.2 feet distant.

That prior to and at the commencement of this action the defendants were and ever since have been and now are the owners (subject only to the paramount title of the United States) and in the possession and entitled to the possession of the whole and every part of the conflict areas described in the complaint herein and existing between said Mayflower No. 4 and Mayflower No. 5 Lode mining claims and the Perego mining claim, claimed by the plaintiff herein, which conflict areas are now particularly described, with same magnetic variations, as follows, to wit:

*First. (Conflict Area Between Mayflower No. 4 and Perego.)*

Commencing at post No. 3 of the official survey of said Mayflower No. 4 Lode location, lot No. 615, and running thence along the southern side line thereof south 67 deg. 30 min. west 1,114 feet to post No. 4 of said Mayflower No. 4 location; thence north 8 deg. 30 min. west 50.5 feet to a point on the northern side line of said Perego Lode mining claim north 67 deg. 30 min. east 306.3 feet from post No. 3, at northwest corner thereof; thence along
24 the northern side line of said Perego Lode mining claim north 67 deg. 30 min. east 1,114 feet to a point south 67 deg. 30 min. west 79.7 feet from post No. 4, at northeast corner thereof; thence south 8 deg. 30 min. east 50.5 feet to the place of beginning, containing 1.253 acres.

Second (conflict area between Mayflower No. 5 and Perego):

Commencing at post No. 1 of the official survey of said May Flower No. 5 Lode location, lot No. 616, and running thence south 67 deg. 30 min. west 1,071 feet to post No. 2 thereof; thence north 38 deg. 50 min. west 208.4 feet to post No. 3 thereof; thence north 67 deg. 30 min. east 43 feet from post No. 4 of said Mayflower No. 4 location, lot No. 615; thence along the line between said Mayflower No. 4 and Mayflower No. 5 Lode locations, lots No. 615 and No. 616, north 67 deg. 30 min. east 1,071 feet to posts Nos. 3 and 4 of said locations, respectively; thence south 38 deg. 50 min. east 208.4 feet to the place of beginning, containing 4,917 acres. From post No. 4 of said Mayflower No. 5 location northwest corner post No. 4 of said Perego Lode claim bears north 9 deg. 27 min. east 104.14 feet distant.

That the defendants are entitled to United States patents for said Mayflower No. 4 and Mayflower No. 5 locations, including said conflict areas; that the adverse claim of the plaintiff to said conflict areas and portions of said Mayflower No. 4 and Mayflower No. 5 Lode mining claims is wrongful and without right, and the plaintiff did not have at the commencement of this suit or at the time he filed his protest and adverse claim in the United States land
25 office at Salt Lake City, Utah, against the defendants' application for patent for said Mayflower No. 4 and Mayflower No. 5 Lode mining claims, and has not now any right, title, or interest, legal or equitable, of, in, or to said Mayflower No. 4 and Mayflower No. 5 Lode mining claims or either of them, or of, in, or to said or any part of said two conflict areas hereinbefore described.

That the defendants' right and title is hereby forever confirmed and quieted as against the plaintiff and as against any and ail persons claiming by, through, or under him, and the plaintiff and all such persons are hereby forever estopped, enjoined, and debarred from setting up any adverse claim of right or title in or to said or any part of said Mayflower No. 4 and Mayflower No. 5 Lode mining claims, or in or to said or any part of said conflict areas hereinbefore described; and it is further ordered, adjudged, and decreed that the defendants herein have and recover of and from the plaintiff their costs, taxed herein at $—.

Dated August 18, 1891.

By the court:

C. S. ZANE, *Judge.*

[SEAL.]

HENRY G. McMILLAN, *Clerk,*
By GEO. D. LOOMIS, *Deputy.*

Endorsed: # 8334. Title court and cause. Decree. Filed Aug. 18, 1891. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

26 TERRITORY OF UTAH, } *ss:*
*County of Salt Lake,* }

In the District Court of the Third Judicial District.

WM. PEREGO, Plaintiff,
*vs.*
WM. H. DODGE *et al.*, Defendants. } # 8334.

To Messrs. Bennett, Marshall & Bradley, Arthur Brown, and W. H. Dickson, attorneys for defendants:

Take notice that the plaintiff intends to move the court to vacate and set aside the findings and decision and decree rendered in the above-entitled cause and for a new trial upon the following grounds, to wit:

1st. Irregularity in the proceedings of the court by which the plaintiff was prevented from having a fair trial.

2nd. Errors of law occurring at the trial, to wit, the trial of said cause by the court without a waiver of jury by the plaintiff.

3rd. Because the findings and decree are irregular and void as appears by the record.

Said motion will be made upon affidavit filed, a copy of which is hereto attached, and upon the minutes of the court in the said cause.

GERALD G. P. JACKSON,
*Attorney for Plaintiff.*

27 TERRITORY OF UTAH, } ss:
*County of Salt Lake,* }

In the District Court of the Third Judicial District.

WM. PEREGO, Plaintiff,
*vs.*
WM. H. DODGE *et al.*, Defendants. } No. 8334.

UTAH TERRITORY, } ss:
*Summit County,* }

William Perego, being duly sworn, deposes and says:

1st. That he is the plaintiff in the above-entitled action.

2nd. That the value in controversy in this suit exceeds one thousand dollars ($1,000).

3rd. That he did not at any time, orally or in writing, in person or by attorney, waive his right of trial by jury in said suit, and that he at all times desired to have the same tried by jury.

4th. That no notice of the decision of the court in this cause has been served upon him or his attorney.

WM. PEREGO.

Sworn to and subscribed before me this 5th day of August, A. D. 1892.

[SEAL.] THOMAS CUPIT,
*Notary Public.*

Endorsed: #8334. Title court and cause. Service of copy admitted, reserving right to object that the same not served in time. W. H. Dickson, att'y for def'ts. 8, 6, '92. Bennett, Marshall & Bradley, att'ys for def'ts. Filed Aug. 6, 1892. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

28 TERRITORY OF UTAH, } ss:
*County of Salt Lake,* }

In the Third Judicial District Court.

WILLIAM PEREGO, Plaintiff,
*vs.*
WM. H. DODGE *et al.*, Defendants. } No. 8334.

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the said Territory of Utah from the judgment and decree herein made and entered in the said

3rd judicial district court on the 18th day of August, 1891, in favor of said defendant- and against him, the said plaintiff, and from the whole thereof.

GERAL- G. P. JACKSON,
*Attorney for Plaintiff.*

To H. G. McMillan, clerk third judicial district court, and W. H. Dickson, Esq., Arthur Brown, Esq., and Messrs. Bennett, Marshall & Bradley, attorneys for defendants, Salt Lake City.

Endorsed: # 8334. Title court and cause. Notice of appeal. Filed August 15, 1892. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

29 In the District Court of the Third Judicial District of Utah Territory.

WM. PEREGO, Plaintiff,
*vs.*
WM. H. DODGE *et al.*, Defendants.

On motion of G. G. P. Jackson, attorney for the plaintiff, it is ordered that plaintiff be, and he is hereby, allowed thirty days' time to file an undertaking on appeal herein.

Dated August 16th, 1892.

TERRITORY OF UTAH,
*County of Salt Lake,* } *ss:*

In the District Court of the Third Judicial District.

WM. PEREGO, Plaintiff,
*vs.*
WM. H. DODGE *et al.*, Defendants. } # 8334.

To Messrs. Bennett, Marshall & Bradley, Arthur Brown, and Wm. H. Dickson, attorneys for defendants:

Please take notice that I shall move this honorable court, in the court-room, at No. 111 Second South street, in the city of Salt Lake, on the 10th day of September, 1892, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the findings and decision and decree rendered in the above-entitled cause, and for a new trial of said cause, and for such other and further order as may be just. The said motion will be made upon the following grounds, to wit:

1st. Irregularity in the proceedings of the court by which
30 the plaintiff was prevented from having a fair trial.

2nd. Errors of law occurring at the trial, to wit, the trial of said cause by the court without a waiver of jury by the plaintiff.

3rd. Because the findings and decree are irregular and void as appears by the record.

As set forth in a notice of intention to make such motion, together with an affidavit attached to said notice of intention of motion, a copy of which was served upon you and filed with the clerk of said court the 6th day of August, 1892, and upon the pleadings, papers, and records in the above cause.

GERALD G. P. JACKSON,
*Attorney for Plaintiff.*

Endorsed: # 8334. Title court and cause. Received copy of within notice this 3rd day of Septem., 1892. W. H. Dickson, Bennett, Marshall & Bradley. Filed September 3rd, 1892. Henry G. McMillan, clerk.

In the District Court for the Third Judicial District of Utah Territory.

WILLIAM PEREGO, Plaintiff,
*vs.*
WM. H. DODGE *et al.*, Defendants.

On motion of plaintiff's attorney, it is ordered that thirty days' time be, and the same is hereby, allowed to file an undertaking on appeal herein.

Dated September 10th, 1892.

31 In the District Court for the Third Judicial District of Utah Territory.

WILLIAM PEREGO, Plaintiff,
*vs.*
WM. H. DODGE *et al.*, Defendants.

This cause coming on to be heard upon the motion of plaintiff to vacate and set aside the decree and to grant a new trial herein, and the same having been argued by James Y. Marshall and by Mr. Jackson for plaintiff and by W. H. Dickson and John A. Marshall for defendant, and being submitted and considered by the court, and it appearing to the court that no sufficient reason is given for granting a new trial, and that the findings and decree are supported by the evidence, it is ordered that said motion for a new trial herein be, and the same is hereby, overruled. Plaintiff excepts.

Dated September 19th, 1892.

TERRITORY OF UTAH,
*County of Salt Lake,* } *ss:*

In the District Court for the Third Judicial District.

WILLIAM PEREGO, Plaintiff,
*vs.*
WM. H. DODGE *et al.*, Defendants.

No. 8334. Notice of Appeal from Order Denying New Trial.

You will please take notice that the plaintiff in the above action hereby appeals to the supreme court of the Territory of Utah from

the judgment and order therein made and entered in the
32 said district court for the third judicial district on the nineteenth day of September, 1892, in favor of the defendants in said action and against said plaintiff, denying the said plaintiff's motion for a new trial.

GERALD G. P. JACKSON,
*Attorney for Plaintiff.*

To Wm. H. Dickson, Esq., Arthur Brown, Esq., and Messrs. Bennett, Marshall & Bradley, attorneys for defendants.

Endorsed: #8334. Title court and cause. Notice of appeal. Received a copy of the within notice of appeal Oct. 4, 1892. Bennet, Marshall & Bradley, def'ts' att'ys. Filed Oct. 4, 1892. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy. Gerald G. P. Jackson, attorney for plaintiff.

TERRITORY OF UTAH, } ss:
*County of Salt Lake,* }

I, Henry G. McMillan, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original complaint, answer, trial entries, findings, decree, motion, and affidavit for new trial, notice of appeal, order granting 30 days' time to file undertaking, notice of motion for new trial, order granting 30 days' time to file undertaking, order overruling motion for new trial, notice of appeal; and I do further certify that an undertaking on appeal has been filed herein, and that the same is in due form in the action therein entitled, filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 23rd day of November, A. D. 1892.

HENRY G. McMILLAN, *Clerk,*
[SEAL.] By GEO. D. LOOMIS, *Deputy Clerk.*

33 In the Supreme Court of Utah Territory, Regular January Term, 1893.

WILLIAM PEREGO, Appellant, }
*vs.*
WM. H. DODGE *et al.* }

TUESDAY, *March 28th.*

In this cause counsel for appellant moves for a continuance and offers in behalf of said motion a certain affidavit, and the same upon being read in open court was, on motion of counsel for respondents, deemed scandalous, and leave to file said affidavit was refused and a continuance of said cause was denied.

Thereupon the cause was argued by Gerald G. P. Jackson, Esq., in behalf of appellant, by John A. Marshall, Esq., and W. H. Dickson, Esq., in reply, was submitted and taken under advisement.

Regular January Term, 1893.

WILLIAM PEREGO, Appellant,
*vs.*
WM. H. DODGE *et al.*

SATURDAY, *April* 15*th.*

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged (Blackburn, J., dissenting) that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

34 In the Supreme Court of Utah Territory, Regular June Term, 1893.

WILLIAM PEREGO, Appellant,
*vs.*
WM. H. DODGE *et al.*

TUESDAY *June* 13*th.*

In this cause it was ordered that the appellant have until Thursday of this week to file additional affidavits of value of the matter in dispute, and that the respondents shall have until the following Thursday, to wit, the 22nd day of June, to file counter-affidavits; and it is further ordered that the remittitur be stayed in the meantime.

Regular June Term, 1893.

WILLIAM PEREGO, Appellant,
*vs.*
W. H. DODGE *et al.*

THURSDAY, *June* 22*nd.*

The motion of appellant for the allowance of an appeal to the Supreme Court of the United States being now submitted and affidavits of value of matter in dispute being filed by both parties to this suit, it is ordered that the appeal as prayed for be, and is hereby, allowed, and the amount of a bond to be given thereon is fixed at $500.00.

35 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

The above-named plaintiff and appellant, William Perego, conceiving himself aggrieved by the order entered upon the 15th day of April, 1893, and the further order of the 6th day of June, 1893, in the above-entitled cause, doth hereby appeal from said orders to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record and

proceedings and papers upon which said orders and each of said orders were made, duly authenticated, may be sent to the Supreme Court of the United States, and he further, by this his appeal and petition for allowance thereof, shows to this court that the value of the ground or matter in controversy in this suit was at the time of the commencement of said suit worth a sum of money in excess of the sum of ten thousand ($10,000.00) dollars, and was worth such sum of money at the time of the rendition of judgment.

[Seal Supreme Court, Territory of Utah, United States of America.]

JAMES Y. MARSHALL,
GERALD G. P. JACKSON,
*Attorneys for Plaintiff & Appellant, Salt Lake City, Utah.*

Dated Salt Lake City, Utah, this twelfth (12th) day of June, 1893.

36 TERRITORY OF UTAH, }
*County of Salt Lake,* } *ss:*

William Perego, being first duly sworn, on oath says that he is the plaintiff and appellant in the above-entitled cause; that he has read the above and foregoing appeal and prayer or petition for the allowance thereof, and that the facts therein stated are true of his own knowledge except as to those matters therein stated upon information and belief and as to those matters he believes it to be true.

WM. PEREGO.

Subscribed and sworn to before me this 12th day of June, 1893.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
*Clerk Supreme Court of Utah Territory,*
By JOHN C. SHIPP,
*Deputy Clerk.*

And now, to wit, upon the 22nd day of June, 1893, it is ordered that the appeal prayed for be allowed as prayed for.

JAMES A. MINER,
*Justice of the Supreme Court for the Territory of Utah.*

36½ [Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants and respondents. Appeal and order. Service of a copy of the within appeal and order admitted this — day of June, 1893. Filed in the supreme court Jun- 12, 1893, at Salt Lake City, Utah. Jos. P. Bache, clerk. Jas. Y. Marshall, Gerald G. P. Jackson, atty's for pl't'ff & appellant.

37 In the Supreme Court of Utah Territory.

WILLIAM PEREGO, Appellant,
*vs.*
W. H. DODGE *et al.*, Respondents.

MINER, *J.:*

This action is to quiet title, is brought upon an adverse claim filed by the plaintiff against the defendant, who had applied for a United States patent to mineral lands in Summit county, Utah, to which the plaintiff claims to have its possession and right of possession.

The defendant- deny the material allegations in the complaint and claim to have the possession, ownership, and right of possession thereto, and pray that defendants be adjudged to be the owners thereof and entitled to the possession of the same, and for all general and proper relief, &c.

It appears from the abstract as it is presented that this cause come on for trial on May 6th, 1891, before the court without a jury. The attorneys of the respective parties were present and conducted the trial, which lasted several days. At the close of the trial arguments of the respective counsel were made and the case was finally submitted to the court, without a jury, for its determination. The attorneys of both parties were present during the entire pro-
38 ceeding, and it does not appear that any demand for a jury trial was made, or that any objection or exception was made at any time during the trial against the right of the court to try the case without a jury. This objection is raised for the first time in this court.

After the case was submitted the court entered a decree in favor of the defendants and against the plaintiff, quieting and confirming the title of the defendants to the land and claims in controversy, and adjudging the defendants to be the owners thereof and entitled to the possession of the same.

The plaintiff served his notice to set aside the findings, decision, and decree and for a new trial because of irregularity in the proceedings of the court by which plaintiff was prevented from having a jury trial, and because the court tried said cause without plaintiff having waived his right to a trial by jury. The motion was based upon the minutes of the court and upon an affidavit filed wherein affiant states that plaintiff did not orally or in writing waive his right to a trial by jury.

Upon an examination of this record we find there is no statement or bill of exceptions in this case. Yet the abstract contains plaintiff's notice of intention to move for a new trial, an affidavit upon which it is based, and minutes of the trial court. These papers do not form any part of the judgment-roll and are improperly in the record.

39 So far as the motion for new trial was made on the minutes of the court, the order denying it could only be reviewed by embodying such minutes in the statement of the case. The affidavit upon which the motion seems to have been based was not identified

by the court as having been used on the hearing and it is not embodied in any statement or bill of exceptions.

A notice of intention to move for a new trial is no part of the record on appeal except when shown by a bill of exceptions or statement of the case.

Herlick *vs.* McDonald, 80 Cal., 472.
People *vs.* Smith, 3 Utah, 425.
Lowell *vs.* Parkinson, 4 Utah, 64.
Bowring *vs.* Bowring, 4 Utah, 185.
Reever *vs.* White, 30 Pac. Rep. (Utah), 685.
Walsh *vs.* Hutchinson, 60 Cal., 228.
Pico *vs.* Colne, 78 Cal., 384.
Girdner *vs.* Bishwick, 69 Cal., 269.
Sec. 3404, 2 C. L., 1888.
Dowingues *vs.* Mascott, 74 Cal., 269.

These papers being improperly in the record on appeal should be disregarded by the court.

Hayne on New Tiral and Appeal, sec. 265.
Graham *vs.* Linden, 1 Idaho, 780.

In Reever *vs.* White, 30 Pac. Rep., 685, this court held that on appeal from the judgment, without a statement or bill of exceptions, nothing is brought up or is a part of the record on appeal except the judgment-roll, and no question outside of the judgment-roll could be considered; that if any further record is sought to be used it should be made and presented in the form of a statement or bill of exceptions.

With this imperfect record before us we do not consider it necessary to discuss the question as to whether appellant was entitled to a jury trial under the circumstances shown. The question thus attempted to be presented, however, was fully discussed in—

Kearney *vs.* Case, 12 Wall., 275.
Hayne on New Trial and Appeal, p. 120, 121.
Hitchcide *vs.* Caruthers, 82 Cal., 523.
Haules *vs.* Clead, 84 Cal., 272.

These authorities support the position that by going to trial before the court without a jury and without making any objection the appeallant waives his right to a trial by jury.

The appellant contends that the trial court erred in adjudging that the respondents were the owners of the premises in controversy, for the reason that respondents filed no counter-claim or cross-complaint. We do not think this contention can be sustained; no objection was taken to the answer before judgment, and the respondents alleged facts which seem to entitled them to affirmative relief under—

Sec. 2326, Rev. St. U. S.
Wolveston *vs.* Nichols, 119 U. S., 485.

It is not what a pleading is called which determines its character, but the facts which it sets up. Its character must be determined by the court. The relief granted seems to have been proper under the facts stated and the prayer of the pleadings.

Gregory *vs.* Bovier, 77 Cal., 121.
Kitts *vs.* Austin, 83 Cal., 167.
Holmes *vs.* Picket, 56 Cal., 311.
Rev. St. U. S., sec. 2326.
Wolveton *vs.* Nichols, 119 U. S., 485.

We find no reversible error in the record. The judgment below is affirmed with costs.

I concur.
BARTCH, *J.*

I dissent.
BLACKBURN, *J.*

Marked filed April 15, 1893.

JOS. P. BACHE, *Clerk.*

41 By the Honorable Charles S. Zane, chief justice of Utah, to W. H. Dodge, E. P. Ferry, A. B. Richardson, J. N. Jacobson, Martin McGrath, and Mrs. Martin McGrath, and to Messrs. Bennett, Marshall & Bradley, Brown & Henderson, and W. H. Dickson, Esq., their attorneys, Greeting:

Whereas William Perego has lately appealed to the Supreme Court of the United States from a judgment and decree rendered in the supreme court of Utah Territory in favor of you, the said W. H. Dodge, E. P. Ferry, A. B. Richardson, J. N. Jacobson, Martin McGrath, and Mrs. Martin McGrath, and having filed the security required—

You are, therefore, hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the city of Washington, D. C., within sixty (60) days from date of this citation, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the city of Salt Lake, in the Territory of Utah, this 17th day of July, A. D. 1893.

C. S. ZANE,
*Chief Justice of Utah Territory.*

Attest:

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
*Clerk Supreme Court of Utah.*

Due service of a copy of the above citation admitted this 17 day of July, A. D. 1893.

W. H. DICKSON,
*One of the Attorneys for Respondents and Def'ts in Error.*

[Endorsed:] In the supreme court, Utah. William Perego, appellant, *vs.* William H. Dodge *et al.*, defendants. Citation. Filed July 17th, 1893. Joseph P. Bache, clerk.

42 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Summit,* } *ss:*

William Perego, being sworn, on oath says that he is the plaintiff and appellant in the above-entitled cause and the owner of and entitled to the possession of the ground in controversy in this suit, known as the Perego Lode mining claim, situate in the Utah mining district, county of Summit and Territory of Utah, and that the same at the commencement of the above cause was worth a sum of money in excess of the sum of ten thousand dollars.

WM. PEREGO.

Subscribed and sworn to before me this first day of June, 1893.

[Seal Thomas Cupit, Notary Public, Summit County, Utah Territory.]

THOS. CUPIT,
*Notary Public.*

My commission expires July 20th, 1893.

[Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants and respondents. Affidavit value of ground in controversy. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl't'ff & appellant.

43 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Summit,* } *ss:*

Michael Fitzgerald, being sworn, on oath says that he is a miner by occupation and familiar with the Perego Lode mining claim, the ground in controversy in this suit, which is situated in the Uintah mining district, county of Summit and Territory of Utah; that he was familiar with said Perego Lode mining claim at the commencement of the above-entitled action, and that said ground and mining claim was at that time worth a sum of money in excess of the sum of ten thousand dollars.

MICHAEL FITZGERALD.

Subscribed and sworn to before me this first day of June, 1893.

[Seal Thomas Cupit, Notary Public, Summit County, Utah Territory.]

THOS. CUPIT,
*Notary Public.*

My commission expires July 20th, 1893.

[Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants & respondents. Affidavit value of ground in controversy. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl't'ff & appellant.

44 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant, *vs.* WILLIAM H. DODGE *et al.*, Defendants and Respondents. } Affidavit Value of Ground in Controversy.

TERRITORY OF UTAH, *County of Salt Lake,* } ss:

Lewis N. Smith, being duly sworn, on oath says that he is a miner by occupation, and that he is now and since the month of May, 1888, has been a resident of Salt Lake City and county, Territory of Utah, and Park City, Summit county, Territory of Utah; that he is familiar with the Uintah mining district, in the said county of Summit, and particularly with that portion of said district known as the Perego Lode mining claim, the ground in controversy in this suit, and that said ground was at the time of the commencement of this action worth a sum of money in excess of the sum of ten thousand dollars.

LEWIS N. SMITH.

Subscribed and sworn to before me this 29th day of May, 1893.

[Seal S. P. Armstrong, Notary Public, Salt Lake County, Utah.]

S. P. ARMSTONG,
*Notary Public.*

[Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants and respondents. Affidavit value of ground in controversy. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl't'ff & appellant.

45 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

TERRITORY OF UTAH, *County of Summit*, } *ss*:

Richard Campbell, being sworn, on oath says that he is a miner by occupation and familiar with the Perego Lode mining claim, the ground in controversy in this suit, which is situated in the Uintah mining district, county of Summit and Territory of Utah; that he was familiar with said Perego Lode mining claim at the commencement of the above-entitled action, and that said ground and mining claim was at that time worth a sum of money in excess of the sum of ten thousand dollars.

RICHARD CAMPBELL.

Subscribed and sworn to before me this first day of June, 1893.

[Seal Thomas Cupit, Notary Public, Summit County, Utah Territory.]

THOS. CUPIT,
*Notary Public.*

My commission expires July 20th, 1893.

[Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.* defendants and respondents. Affidavit value of ground in controversy. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl't'ff & appellant.

46 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

TERRITORY OF UTAH, *County of Summit*, } *ss*:

Thomas A. Clark, being sworn, on oath says that he is a miner by occupation and familiar with the Perego Lode mining claim, the ground in controversy in this suit, which is situated in the Uintah mining district, county of Summit and Territory of Utah; that he was familiar with the said Perego Lode mining claim at the commencement of the above-entitled action, and that said ground and mining claim was at that time worth a sum of money in excess of the sum of ten thousand dollars.

THOMAS A. CLARK.

Subscribed and sworn to before me this first day of June, 1893.

[Seal Thomas Cupit, Notary Public, Summit County, Utah Territory.]

THOS. CUPIT,
*Notary Public.*

My commission expires July 20th, 1893.

[Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants & respondents. Affidavit value of ground in controversy. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl't'ff & appellant.

47 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Summit,* } *ss:*

Leonard Phillips, being sworn, on oath says that he is a miner by occupation and familiar with the Perego Lode mining claim, the ground in controversy in this suit, which is situated in the Uintah mining district, county of Summit and Territory of Utah; that he was familiar with the said Perego Lode mining claim at the commencement of the above-entitled action, and that said ground and mining claim was at that time worth a sum of money in excess of the sum of ten thousand dollars.

LEONARD PHILLIPS.

Subscribed and sworn to before me this first day of June, 1893.

[Seal Thomas Cupit, Notary Public, Summit County, Utah Territory.]

THOS. CUPIT,
*Notary Public.*

My commission expires July 20th, 1893.

[Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants & respondents. Affidavit value of ground in controversy. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl't'ff & appellant.

48 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Summit,* } *ss:*

Charles Barnicott, being sworn, on oath says that he is a miner by occupation and familiar with the Perego Lode mining claim, the ground in controversy in this suit, which is situated in the Uintah mining district, county of Summit and Territory of Utah; that he was familiar with said Perego Lode mining claim at the commencement of the above-entitled action, and that said ground and

mining claim was at that time worth a sum of money in excess of the sum of ten thousand dollars.

CHAS. BARNICOTT.

Subscribed and sworn to before me this first day of June, 1893.

[Seal Thomas Cupit, Notary Public, Summit County, Utah Territory.]

THOS. CUPIT,
*Notary Public.*

My commission expires July 20th, 1893.

[Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants & respondents. Affidavit value of ground in controversy. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl't'ff & appellant.

49 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Summit,* } *ss:*

Charles E. Street, being sworn, on oath says that he is a miner by occupation and familiar with the Perego Lode mining claim, the ground in controversy in this suit, which is situated in the Uintah mining district, county of Summit and Territory of Utah; that he was familiar with said Perego Lode mining claim at the commencement of the above-entitled action, and that said ground and mining claim was at that time worth a sum of money in excess of the sum of ten thousand dollars.

CHAS. E. STREET.

Subscribed and sworn to before me this first day of June, 1893.

[Seal Thomas Cupit, Notary Public, Summit County, Utah Territory.]

THOS. CUPIT,
*Notary Public.*

My commission expires July 20th, 1893.

[Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants & respondents. Affidavit of value — ground in controversy. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl't'ff & appellant.

50 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Summit,* } *ss:*

Michael F. Clark, being sworn, on oath says that he is a miner by occupation and familiar with the Perego Lode mining claim, the ground in controversy in this suit, which is situated in the Uintah mining district, county of Summit and Territory of Utah; that he was familiar with said Perego Lode mining claim at the commencement of the above-entitled action, and that said ground and mining claim was at that time worth a sum of money in excess of the sum of ten thousand dollars.

MICHAEL F. CLARK.

Subscribed and sworn to before me this first day of June, 1893.

[Seal Thomas Cupit, Notary Public, Summit County, Utah Territory.]

THOS. CUPIT,
*Notary Public.*

My commission expires July 20th, 1893.

[Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants & respondents. Affidavit value of ground in controversy. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl't'ff & appellant.

50½ [Endorsed·] 322. In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants & respondents. Affidavits value of ground in controversy. Service of copies of the within nine affidavits of value of ground in controversy admitted this 5th day of June, 1893. Bennett, Marshall & Bradley, M., def'ts' att'ys. Filed in the supreme court Jun- 5, 1893, at Salt Lake City, Utah. Jos. P. Bache, clerk. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl't'ff & appellant.

51 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Salt Lake,* } *ss:*

William Perego, being sworn, on oath says that there is now pending in the third judicial district court of the Territory of Utah a suit brought in ejectment by him, the above-named plaintiff, against

the above-named defendants, William H. Dodge *et al.;* that the complaint in said suit was filed with the clerk of said court upon the 27th day of April, 1889, and that the allegation of ejectment is that plaintiff was ejected and ousted from a part of the ground in controversy in this suit and another portion of that certain lode mining claim known as the Perego Lode mining claim described in the complaint herein; that thereafter, by order of the said third judicial district court dated the 10th day of May, 1889, the said defendants, being William H. Dodge *et al.*, were permitted to work and operate the premises described in said complaint, and that the said defendants, William H. Dodge *et al.*, should file, upon the 10th day of each and every calendar month thereafter, a statement of all ores and valuable minerals extracted from the ground described in said complaint and the value of said ores and valuable minerals after deducting therefrom the necessary costs and expenses for mining and reducing said ores and valuable minerals extracted from the premises described in said complaint; that in pursuance of said
52 order David Keith, one of the defendants, joined with said William H. Dodge *et al.*, acting for and in behalf of himself and the said William H. Dodge *et al.*, filed affidavits and reports in said court, as ordered by said court, and that said affidavits and reports are dated at divers days commencing with the thirty-first day of May, 1889, and terminating the twenty-eighth day of February, 1892, the date of last of said affidavits and reports; that said affidavits and reports all certify that the amounts therein sworn to and accounted for are for ores and valuable minerals extracted from the premises described in said complaint, comprising part of the ground in controversy in this suit and other ground as aforesaid, and that the aggregate amount thus certified to have been mined and extracted during the dates aforesaid is largely in excess of the sum of three hundred thousand dollars; that said affidavits and reports are of record in the said third judicial district court and were filed before and after judgment in this above-entitled cause; that the amount of ores and valuable minerals and the net value thereof certified to have been extracted from said premises up to the date of the judgment of the above-entitled cause and including the date of said judgment was in excess of the sum of one hundred and fifty thousand dollars.

Affiant further upon information and belief swears that there are large and extensive workings in the ground in controversy in this suit, and that large amounts of the sums of money above set forth and in excess of the sum of ten thousand dollars were extracted and removed therefrom before the rendition of the judgment herein.

WM. PEREGO.

Subscribed and sworn to before me this 12th day of June, 1893.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
*Clerk Supreme Court of Utah Territory,*
By JOHN C. SHIPP,
*Deputy Clerk.*

52½ [Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff & appellant, *vs.* William H. Dodge *et al.*, defendants & respondents. Affidavit of value. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl't'ff & app'l't.

53 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents. } Affidavit.

TERRITORY OF UTAH, }
*County of Summit,* } *ss:*

Thomas A. Clark, being sworn, on oath says that he is a miner by occupation and familiar with the Perego Lode mining claim, the ground in controversy in this suit, and that he was familiar with said ground at the time of the rendition of judgment in this suit, and that said ground was at that time worth a sum of money in excess of the sum of ten thousand dollars and is now worth such sum of money.

THOMAS A. CLARK.

Subscribed and sworn to before me this tenth day of June, A. D. 1893.

[Seal David B. Tewkesbury, Notary Public, Summit County, Utah.]

DAVID B. TEWKESBURY,
*Notary Public.*

My commission expires Nov. 28, 1894.

54 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents. }

TERRITORY OF UTAH, }
*County of Summit,* } *ss:*

Charles Barnicott, being sworn, on oath says that he is a miner by occupation and familiar with the Perego Lode mining claim, the ground in controversy in this suit, and that he was familiar with said ground at the time of the rendition of judgment in this suit, and that said ground was at that time worth a sum of money in excess of the sum of ten thousand dollars and is now worth such sum of money.

CHARLES BARNICOTT.

Subscribed and sworn to before me this tenth day of June, A. D. 1893.

[Seal David B. Tewkesbury, Notary Public, Summit County, Utah.]

DAVID B. TEWKESBURY,
*Notary Public.*

My commission expires Nov. 28, 1894.

55 In the Supreme Court of the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents. } Affidavit.

TERRITORY OF UTAH, }
*County of Summit,* } *ss:*

Frank H. White, being sworn, on oath says that he is a miner by occupation and is familiar with the Perego Lode mining claim, the ground in controversy in this suit, and that he was familiar with said ground at the time of rendition of judgment in this suit, and that said ground was at that time worth a sum of money in excess of the sum of ten thousand dollars and is now worth such sum of money.

FRANK H. WHITE.

Subscribed and sworn to before me this tenth day of June, A. D. 1893.

[Seal David B. Tewkesbury, Notary Public, Summit County, Utah.]

DAVID B. TEWKESBURY,
*Notary Public.*

My commission expires Nov. 28, 1894.

56 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents. } Affidavit.

TERRITORY OF UTAH, }
*County of Summit,* } *ss:*

Michael Fitzgerald, being sworn, on oath says that he is a miner by occupation and familiar with the Perego Lode mining claim, the ground in controversy in this suit, and that he was familiar with said ground at the time of the rendition of judgment in this suit, and that said ground was at that time worth a sum of money in excess of the sum of ten thousand dollars and is now worth such sum of money.

MICHAEL FITZGERALD.

Subscribed and sworn to before me this tenth day of June, A. D. 1894.

[Seal David B. Tewkesbury, Notary Public, Summit County, Utah.]

DAVID B. TEWKESBURY,
*Notary Public.*

My commission expires Nov. 28, 1894.

57 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents. } Affidavit.

TERRITORY OF UTAH, }
*County of Summit,* } *ss:*

Leonard W. Phillips, being sworn, on oath says that he is a miner by occupation and familiar with the Perego Lode mining ground, the ground in controversy in this suit, and that he was familiar with said ground at the time of the rendition of judgment in this suit, and that said ground was at that time worth a sum of money in excess of the sum of ten thousand dollars and is now worth such sum of money.

LEONARD W. PHILLIPS.

Subscribed and sworn to before me this tenth day of June, A. D. 1893.

[Seal David B. Tewkesbury, Notary Public, Summit County, Utah.]

DAVID B. TEWKESBURY,
*Notary Public.*

My commission expires Nov. 28, 1894.

58 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents. } Affidavit.

TERRITORY OF UTAH, }
*County of Summit,* } *ss:*

Michael F. Clark, being sworn, on oath says that he is a miner by occupation and familiar with the Perego Lode mining claim, the ground in controversy in this suit, and that he was familiar with said ground at the time of the rendition of judgment in this suit, and that said ground was at that time worth a sum of money in excess of the sum of ten thousand dollars and is now worth such sum of money.

MICHAEL F. CLARK.

Subscribed and sworn to before me this tenth day of June, A. D. 1893.

[Seal David B. Tewkesbury, Notary Public, Summit County, Utah.]

DAVID B. TEWKESBURY,
*Notary Public.*

My commission expires Nov. 28, 1894.

58½ [Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants and respondents. Affidavit of value

ground in controversy. Service of copies of the within seven affidavits of value of ground in controversy admitted this 12th day of June, 1893. Bennett, M., & B., M., att'ys for def'ts. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl'ff & appellant. Filed in the supreme court Jun -12, 1893, at Salt Lake City, Utah. Jos. P. Bache, clerk.

59 In the Supreme Court of Utah Territory.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et als.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Summit,* } *ss:*

James Hickey, being first duly sworn, deposes and says: I am and for more than 20 years last past have been a miner by occupation; that for 4 years last past I have been and now am engaged in my said occupation in Uintah mining district, Summit county, Utah Territory, in which district the premises here in controversy are situated, and for 4 years last past I have been and now am the superintendent of the Crescent Mining Company in said district. I have carefully examined and am familiar with the mining ground and premises embraced within the alleged Perego mining claim (including the premises in controversy in this action); that there is not now nor was there ever any vein, ledge, lode, or other form of deposit of mineral-bearing rock of any kind or nature the top or apex of which or of any part of which lies within the surface boundaries of the said alleged Perego mining claim (including the premises in controversy) extended downward vertically; that the mining ground and premises embraced within the whole of said alleged Perego mining claim (including the premises in controversy) are not now nor were they ever of any value whatever for or on account of any minerals now or ever contained therein; that said mining ground and premises were not at the time of the commencement of this action or at any time since and are not now worth to exceed the sum of $500.00.

JAMES HICKEY.

Subscribed and sworn to before me this 17 day of June, 1893.
[Seal Walter Scott, Notary Public, Summit Co., Utah.]

WALTER SCOTT,
*Notary Public.*

My commission expires Feb'y 23, 1895.

60 In the Supreme Court of Utah Territory.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et als.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Summit,* } *ss:*

Richard Williams, being first duly sworn, deposes and says: I am and for more than 28 years last past have been a miner by occupation; that for 8 years last past I have been and now am engaged in my said occupation in Uintah mining district, Summit county, Utah Territory, in which district the premises here in controversy are situated, and for 2½ years last past I have been and now am the foreman of the Anchor Mining Company in said district. I have carefully examined and am familiar with the mining ground and premises embraced within the alleged Perego mining claim (including the premises in controversy in this action); that there is not now nor was there ever any vein, ledge, lode, or other form of deposit of mineral-bearing rock of any kind or nature the top or apex of which or of any part of which lies within the surface boundaries of the said alleged Perego mining claim (including the premises in controversy) extended downward vertically; that the mining ground and premises embraced within the whole of said alleged Perego mining claim (including the premises in controversy) are not now nor were they ever of any value whatever for or on account of any minerals now or ever contained therein; that said mining ground and premises were not at the time of the commencement of this action or at any time since and are not now worth to exceed the sum of $500.00.

RICHARD WILLIAMS.

Subscribed and sworn to before me this 17 day of June, 1893.

[Seal Walter Scott, Notary Public, Summit Co., Utah.]

WALTER SCOTT,
*Notary Public.*

My commission expires Feb'y 23, 1895.

61 In the Supreme Court of Utah Territory.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et als.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Summit,* } *ss:*

John McSorley, being first duly sworn, deposes and says: I am and for more than 22 years last past have been a miner by occupation; that for 9 years last past I have been and now am engaged in my said occupation in the Uintah mining district, Summit county,

Utah Territory, in which district the premises here in controversy are situated, and for 2 years last past I have been and now am the foreman of the Daly West Mining Company in said district. I have carefully examined and am familiar with the mining ground and premises embraced within the alleged Perego mining claim (including the premises in controversy in this action); that there is not now nor was there ever any vein, ledge, lode, or other form of deposit of mineral-bearing rock of any kind or nature the top or apex of which or of any part of which lies within the surface boundaries of the said alleged Perego mining claim (including the premises in controversy) extended downward vertically; that the mining ground and premises embraced within the whole of said alleged Perego mining claim (including the premises in controversy) are not now nor were they ever of any value whatever for or on account of any minerals now or ever contained therein; that said mining ground and premises were not at the time of the commencement of this action or at any time since and are not now worth to exceed the sum of $500.00.

JOHN McSORLEY.

Subscribed and sworn to before me this 17 day of June, 1893.

[Seal Walter Scott, Notary Public, Summit Co., Utah.]

WALTER SCOTT,
*Notary Public.*

My commission expires Feb'y 23, 1895.

62 In the Supreme Court of Utah Territory.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et als.*, Defendants and Respondents.

TERRITORY OF UTAH, }
*County of Summit,* } *ss:*

James Quinn, being first duly sworn, deposes and says: I am and for more than 30 years last past have been a miner by occupation; that for 12 years last past I have been and now am engaged in my said occupation in Uintah mining district, Summit county, Utah Territory, in which district the premises here in controversy are situated, and for 1 year last past I have been and now am the foreman of the Daly Mining Company in said district. I have carefully examined and am familiar with the mining ground and premises embraced within the alleged Perego mining claim (including the premises in controversy in this action); that there is not now nor was there ever any vein, ledge, lode, or other form of deposit of mineral-bearing rock of any kind or nature the top or apex of which or of any part of which lies within the surface boundaries of the said alleged Perego mining claim (including the premises in controversy) extended downward vertically; that the mining ground and premises embraced within the whole of said alleged Perego mining

claim (including the premises in controversy) are not now nor were they ever of any value whatever for or on account of any minerals now or ever contained therein; that said mining ground and premises were not at the time of the commencement of this action or at any time since and are not now worth to exceed the sum of $500.00.

JAMES QUINN.

Subscribed and sworn to before me this — day of June, 1893.

[Seal Walter Scott, Notary Public, Summit Co., Utah.]

WALTER SCOTT,
*Notary Public.*

My commission expires Feb'y 23, 1895.

63 In the Supreme Court of Utah Territory.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et als.*, Defendants and Respondents.

TERRITORY OF UTAH, } *ss:*
*County of Summit,* }

Mathias Conley, being first duly sworn, deposes and says: I am and for more than 25 years last past have been a miner by occupation; that for 11 years last past I have been and now am engaged in my said occupation in Uintah mining district, Summit county, Utah Territory, in which district the premises here in controversy are situated, and for 8 years last past I have been and now am the foreman of the Ontario No. 3 mine in said district. I have carefully examined and am familiar with the mining ground and premises embraced within the alleged Perego mining claim (including the premises in controversy in this action); that there is not now nor was there ever any vein, ledge, lode, or other form of deposit of mineral-bearing rock of any kind or nature the top or apex of which or of any part of which lies within the surface boundaries of the said alleged Perego mining claim (including the premises in controversy) extended downward vertically; that the minin-ground and premises embraced within the whole of said alleged Perego mining claim (including the premises in controversy) are not now nor were they ever of any value whatever for or on account of any minerals now or ever contained therein; that said mining ground and premises were not at the time of the commencement of this action or at any time since and are not now worth to exceed the sum of $500.00.

MATHIAS CONNELLY.

Subscribed and sworn to before me this 17 day of June, 1893.

[Seal Walter Scott, Notary Public, Summit Co., Utah.]

WALTER SCOTT,
*Notary Public.*

My commission expires Feb'y 23, 1895.

64 In the Supreme Court of Utah Territory.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et als.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Summit,* } *ss:*

Edward Grosse, being first duly sworn, deposes and says: I am and for more than 32 years last past have been a miner by occupation; that for 16 years last past I have been and now am engaged in my said occupation in Uintah mining district, Summit county, Utah Territory, in which district the premises here in controversy are situated, and for 4 years last past I have been and now am the foreman of the Ontario No. 2 mine in said district. I have carefully examined and am familiar with the mining ground and premises embraced within the alleged Perego mining claim (including the premises in controversy in this action); that there is not now nor was there ever any vein, ledge, lode, or other form of deposit of mineral-bearing rock of any kind or nature the top or apex of which or of any part of which lies within the surface boundaries of the said alleged Perego mining claim (including the premises in controversy) extended downward vertically; that the minin- ground and premises embraced within the whole of said alleged Perego mining claim (including the premises in controversy) are not now nor were they ever of any value whatever for or on account of any minerals now or ever contained therein; that said mining ground and premises were not at the time of the commencement of this action or any time since and are not now worth to exceed the sum of $500.00.

EDWARD GROSE.

Subscribed and sworn to before me this 17 day of June, 1893.
[Seal Walter Scott, Notary Public, Summit Co., Utah.]

WALTER SCOTT,
*Notary Public.*

My commission expires Febr'y 23, 1895.

65 In the Supreme Court of Utah Territory.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et als.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Summit,* } *ss:*

David Keith, being first duly sworn, deposes and says: I am and for more than 25 years last past have been a miner by occupation; that for 10 years last past I have been and now am engaged in my said occupation in Uintah mining district, Summit county,

Utah Territory, in which district the premises here in controversy are situated, and for three years last past I have been and now am the superintendent of the Anchor Mining Company in said district. I have carefully examined and am familiar with the mining ground and premises embraced within the alleged Perego mining claim (including the premises in controversy in this action); that there is not now nor was there ever any vein, ledge, lode, or other form of deposit of mineral-bearing rock of any kind or nature the top or apex of which or of any part of which lies within the surface boundaries of the said alleged Perego mining claim (including the premises in controversy) extended downward vertically; that the minin- ground and premises embraced within the whole of said alleged Perego mining claim (including the premises in controversy) are not now nor were they ever of any value whatever for or on account of any minerals now or ever contained therein; that said mining ground and premises were not at the time of the commencement of this action or at any time since and are not now worth to exceed the sum of $500.00.

DAVID KEITH.

Subscribed and sworn to before me this 17 day of June, 1893.

[Seal Walter Scott, Notary Public, Summit Co., Utah.]

WALTER SCOTT,
*Notary Public.*

My commission expires Feb'y 23, 1895.

66 In the Supreme Court of Utah Territory.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et als.*, Defendants and Respondents.

TERRITORY OF UTAH, } ss:
*County of Summit,* }

Thomas Kearns, being first duly sworn, deposes and says: I am and for more than 10 years last past have been a miner by occupation; that for 10 years last past I have been and now am engaged in my said occupation in Uintah mining district, Summit county, Utah Territory, in which district the premises here in controversy are situated, and for 2 years last past I have been and now am the superintendent of the Silver King Mining Company in said district. I have carefully examined and am familiar with the mining ground and premises embraced within the alleged Perego mining claim (including the premises in controversy in this action); that there is not now nor was there ever any vein, ledge, lode, or other form of deposit of mineral-bearing rock of any kind or nature the top or apex of which or of any part of which lies within the surface boundaries of the said alleged Perego mining claim (including the premises in controversy) extended downward vertically; that the minin-ground and premises embraced within the whole of said alleged Perego

mining claim (including the premises in controversy) are not now nor were they ever of any value whatever for or on account of any minerals now or ever contained therein; that said mining ground and premises were not at the time of the commencement of this action or at any time since and are not now worth to exceed the sum of $500.00.

THOMAS KEARNS.

Subscribed and sworn to before me this 17 day of June, 1893.

[Seal Walter Scott, Notary Public, Summit Co., Utah.]

WALTER SCOTT,
*Notary Public.*

My commission expires Feb'y 23, 1895.

67 In the Supreme Court of Utah Territory.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Salt Lake,* } *ss:*

John A. Marshall, being first duly sworn, on his oath says that he has read the affidavit made and filed in this action on the 12th day of June, 1893, by Gerald G. P. Jackson, attorney for plaintiff; that at no time did he state to said Jackson that if the appellant or any one in his behalf filed affidavits of value of the ground in controversy in the action that said affidavits would not be contested and that the value of said ground in controversy would not be denied, nor did he state to said Jackson any of the matters or things set forth in said affidavit either in form as therein affirmed or in substance, but that it is true that affiant did state to said Jackson, in conversing with him as to the probable appeal of said cause to the Supreme Court of the United States, that, in affiant's opinion, the premises in controversy were sufficiently valuable to give the Supreme Court of the United States jurisdiction on appeal; that this statement was so made to said Jackson as the individual expression of opinion on the part of affiant, and affiant was
68 not asked to make any agreement or waiver with respect thereto.

JOHN A. MARSHALL.

Dated June 20th, 1893.

Subscribed and sworn to before me this 20th day of June, 1893.

[Seal T. Marionneaux, Notary Public, Salt Lake County, Utah.]

T. MARIONNEAUX,
*Notary Public, Salt Lake County, Utah.*

[Endorsed:] 322. In the supreme court of Utah Territory. William Perego *vs.* William H. Dodge *et als.* Affidavits of value of ground

in controversy. Service by copy admitted this 20th day of June, 1893. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl'ff & appellants. Filed June 20, 1893. Jos. P. Bache, clerk supreme court of Utah Territory. W. H. Dickson, Brown & Henderson, & Bennett, Marshall & Bradley, def'ts' att'ys.

69 In the Supreme Court for the Territory of Utah.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

TERRITORY OF UTAH,
*County of Salt Lake,* } *ss:*

Gerald G. P. Jackson, being sworn, on oath says that he is attorney for the plaintiff and appellant in the above-entitled cause; that on or about the 15th day of April, 1893, before the filing of petition for rehearing therein, affiant was informed by John A. Marshall, Esqr., of Messrs. Bennett, Marshall and Bradley, who are attorneys for the defendants and respondents herein, that if affiant filed affidavits of the value of the ground in controversy in this suit said affidavits would not be contested and the value of said ground in controversy would not be denied. Affiant further swears upon information and belief that said ground in controversy is now and at the time of rendition of judgment was worth a sum of money in excess of ten thousand dollars.

GERALD G. P. JACKSON.
J. C. S.

Subscribed and sworn to before me this 12th day of June, 1893.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
*Clerk Supreme Court of Utah Territory,*
By JOHN C. SHIPP,
*Deputy Clerk.*

[Endorsed:] In the supreme court for the Territory of Utah. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants and respondents. Affidavit. Copy of the within affidavit served this 12th day of June, 1893. Bennett, M. & B., M., att'ys for def'ts. Filed in the supreme court Jun- 12, 1893, at Salt Lake City, Utah. Jos. P. Bache, clerk. Jas. Y. Marshall, Gerald G. P. Jackson, att'ys for pl't'ff and app'l't.

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before

you or some of you, between William Perego, as plaintiff and appellant, and William H. Dodge, E. P. Ferry, A. B. Richardson, J. N. Jacobson, Martin McGrath, and Mrs. Martin McGrath, as defendants and respondents, a manifest error hath happened, to the great damage of the said William Perego, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Supreme Court, Territory of Utah, United States of America.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of July, in the year of our Lord one thousand eight hundred and ninety-three.

JOSEPH P. BACHE,
*Clerk of the Supreme Court of Utah Territory.*

[Endorsed:] Supreme Court United States. William Perego, pl't'ff in error, *vs.* William H. Dodge *et al.*, def'ts in error. Writ of error. Filed by me and a copy lodged in this office this 17th day of July, A. D. 1893. Joseph P. Bache, clerk supreme court of Utah.

71 In the Supreme Court of the United States.

WILLIAM PEREGO, Plaintiff and Appellant,
*vs.*
WILLIAM H. DODGE *et al.*, Defendants and Respondents.

This was an action brought in the third judicial district court for the Territory of Utah upon an adverse claim arising upon application for patent from the United States by the defendants.

The action was to quiet title and there was no cross-complaint filed. The answer denied the material allegations of the complaint and all right of the plaintiff to the possession of the premises in controversy. The cause was tried by the court "without a jury," as recited in the findings of fact and conclusions of law, and a decree entered forever quieting the title to the ground in controversy in favor of the defendants and perpetually enjoining the plaintiff from asserting claim thereto. The plaintiff appealed from said judgment and decree to the supreme court of the Territory of Utah; but the judgment of the trial court was affirmed. The plaintiff now appeals to this court and specifies the following—

72 *Specifications of Error.*

The plaintiff and appellant specifies the following particulars in which the court erred in the determiñation and decision of the above-entitled cause, to wit:

I.

The court erred in affirming the judgment and decree of the lower court, thereby depriving the plaintiff and appellant of the right to trial by jury guaranteed to him by the Constitution of the United States.

II.

The relief sought in the above-entitled cause was of an equitable nature and the rules of chancery should govern. There being no cross-complaint as provided for in the Utah Code of Civil Procedure, section 3231, the trial court erred in granting the defendants affirmative relief, and the appellate court erred in sustaining the decree of the trial court therein.

III.

The court erred in sustaining the jurisdiction of the trial court in the absence of a statute to try said cause without a jury, thus depriving the plaintiff and appellant of the right to trial by jury.

IIII.

The court erred in sustaining the trial court in assuming equitable jurisdiction in a case where there was a full, adequate, and complete remedy at law as appears on the face of the pleadings and in failing to dismiss the bill and order an action at law.

73 V.

The court erred in sustaining the trial court in proceeding without a jury under the statutes and code of civil proceedure of the Territory of Utah, which do not provide for a jury or for waiver of jury in actions to quiet title to mining ground, and which are therefore null and void as being in contravention of article 7 of the amendments to the Constitution of the United States.

VI.

The court erred in deciding that the right to trial by jury is or may be waived by going to trial without objection in a suit brought to quiet title, there being no provision by which plaintiff and appellant could have either demanded or waived a jury trial in such actions under the statutes of the Territory of Utah or in any form of equity suit.

VII.

The court erred in the decision that a jury trial may be waived by failure to demand or by going to trial without a jury, such manner of waiver not being of the modes provided in the statutes of the United States and of Utah, such modes as provided being to the exclusion of all other modes, and the statute must be strictly followed.

VIII.

The court erred in presuming a waiver of jury and in deciding that it must appear affirmatively from the record that a jury was not waived.

IX.

The court erred in deciding that the judgment of the trial court should be sustained when the record does not show jurisdiction in the trial judge to hear or determine said cause. The judgment-roll shows that the cause was tried "without a jury," but fails to show that jurisdiction was conferred upon the trial judge by waiver of a jury in any of the modes provided by statute, or that there was any waiver of jury whatever.

74 X.

The court erred in disregarding the minutes of the trial court and the affidavit on motion for new trial made by the plaintiff, which show affirmatively that jury was not waived.

XI.

The court erred in presuming the jurisdiction of the court and regularity of the judgment in a proceeding conducted contrary to the course of the common law, the record not disclosing authority for the judgment.

XII.

The appeal taken by the plaintiff and appellant is from a judgment and decree against his right to the possession of mining ground by reason of a right conferred by a statute of the United States. The court erred in proceeding to trial of the right to possession of mining ground under statutes of Utah which are in contravention of the provisions of chapter 140, Statutes of 1881, amendatory of section 2326, Revised Statutes of the United States, which are that a jury must determine the right to possession in suits for mining grounds, the Utah statutes providing for no jury trial, and the appellate court erred in sustaining the trial court therein.

XIII.

The court erred in sustaining the trial court in proceeding without a jury to determine facts and decide the right to possession of land in which the United States is an interested party. As such interested party the Government has provided a mode by which its

title may be divested and has prescribed that a jury shall determine conflicting rights and to whom patent shall be granted.

XIV.

The court erred in deciding that a jury could be waived in a trial to determine the right to possession of mining ground in a territorial court, such proceeding being contrary to the statutes of the United States.

75 XV.

The court erred in deciding that a constitutional right could be waived in any manner not provided by statute or in any manner contrary to the modes expressly provided for such waiver by statute.

Therefore the plaintiff and appellant prays that the said cause may be reviewed by this court and that the judgement of the supreme court of the Territory of Utah sustaining and affirming the decree of the trial court may be reversed and the cause remanded for a new trial.

B. F. LEE,
*Counsel for the Plaintiff and Appellant,*
*20 Nassau Street, New York City, N. Y.*

76 [Endorsed:] In the Supreme Court of the United States. William Perego, plaintiff and appellant, *vs.* William H. Dodge *et al.*, defendants & respondents. Specifications of error. Filed July 17th, 1893. Joseph P. Bache, clerk supreme court Utah. B. F. Lee, counsel for plaintiff & appellant, 20 Nassau street, New York city.

77 Know all men by these presents that we, William Perego, as principal, and John M. Scott, of the city and county of Salt Lake and Territory of Utah, and John Kelly, of Park city, Summit county, Territory of Utah, as sureties, are held and firmly bound unto William H. Dodge, E. P. Ferry, A. B. Richardson, J. N. Jacobson, Martin McGrath, Mrs. Martin McGrath, and James H. McKenney, clerk of the Supreme Court of the United States, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said William Dodge, E. P. Ferry, A. B. Richardson, J. N. Jacobson, Martin McGrath, Mrs. Martin McGrath, and James H. McKenney, clerk of the Supreme Court of the United States, their executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 27th day of June, A. D. one thousand eight hundred and ninety-three.

The condition of the above obligation is such that whereas William Perego, the plaintiff and appellant in a certain cause entitled William Perego, plaintiff and appellant, against William H. Dodge and others, defendants and respondents, has prosecuted an appeal

to the Supreme Court of the United States to reverse a judgment in said cause by the supreme court of the Territory of Utah in favor of the said William H. Dodge, E. P. Ferry, A. B. Richardson, J. N. Jacobson, Martin McGrath, and Mrs. Martin McGrath and against said William Perego:

Now, therefore, the condition of this obligation is such that
78 if the above-named William Perego shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then the above obligation to be void; otherwise to remain in full force and virtue.

WM. PEREGO. [SEAL.]
J. M. SCOTT. [SEAL.]
JOHN KELLY. [SEAL.]

Signed, sealed, and delivered in presence of—
S. P. ARMSTRONG.

TERRITORY OF UTAH, } ss:
*County of Salt Lake,* }

John M. Scott and John Kelly, the sureties who executed the foregoing bond and obligation, being severally sworn, each for himself deposes and says that he is a resident and freeholder within the Territory of Utah and worth the sum specified in said bond and obligation as the penalty thereof over and above all his debts and liabilities, exclusive of property exempt from execution.

J. M. SCOTT. [SEAL.]
JOHN KELLY. [SEAL.]

Subscribed and sworn to before me this 27th day of June, A. D. 1893.

[SEAL.] S. P. ARMSTRONG,
*Notary Public.*

Approved by me this 10th day of July, A. D. 1893.
CHARLES S. ZANE,
*Chief Justice for the Territory of Utah.*

Endorsed: Title of cause. Bond. Filed July 10th, 1893. Jos. P. Bache, clerk.

79 UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss:
*County of Salt Lake,* }

I, Joseph P. Bache, clerk of the supreme court in and for the Territory of Utah, by virtue of the foregoing writ of error and in obedience thereto and in pursuance of an appeal allowed in the case of William Perego, as plaintiff and appellant, and W. H. Dodge *et al.*, defendants and respondents, lately pending in said court, do hereby certify that the foregoing contains a true and complete transcript of the record and proceedings had in said court in said cause as the same remain- of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Salt Lake, in the Territory of Utah, this 20th day of July, A. D. 1893.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
*Clerk Supreme Court of Utah.*

Endorsed on cover: Case No. 15,394. Utah Territory supreme court. Term No., 273. William Perego, appellant, *vs.* W. H. Dodge, E. P. Ferry, A. B. Richardson, J. N. Jacobson, Martin McGrath, and Mrs. Martin McGrath. Filed September 21, 1893.

Office Supreme Court U. S.
FILED.
MAR 30 1896
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 273.

WILLIAM PEREGO,

PLAINTIFF AND APPELLANT,

VS.

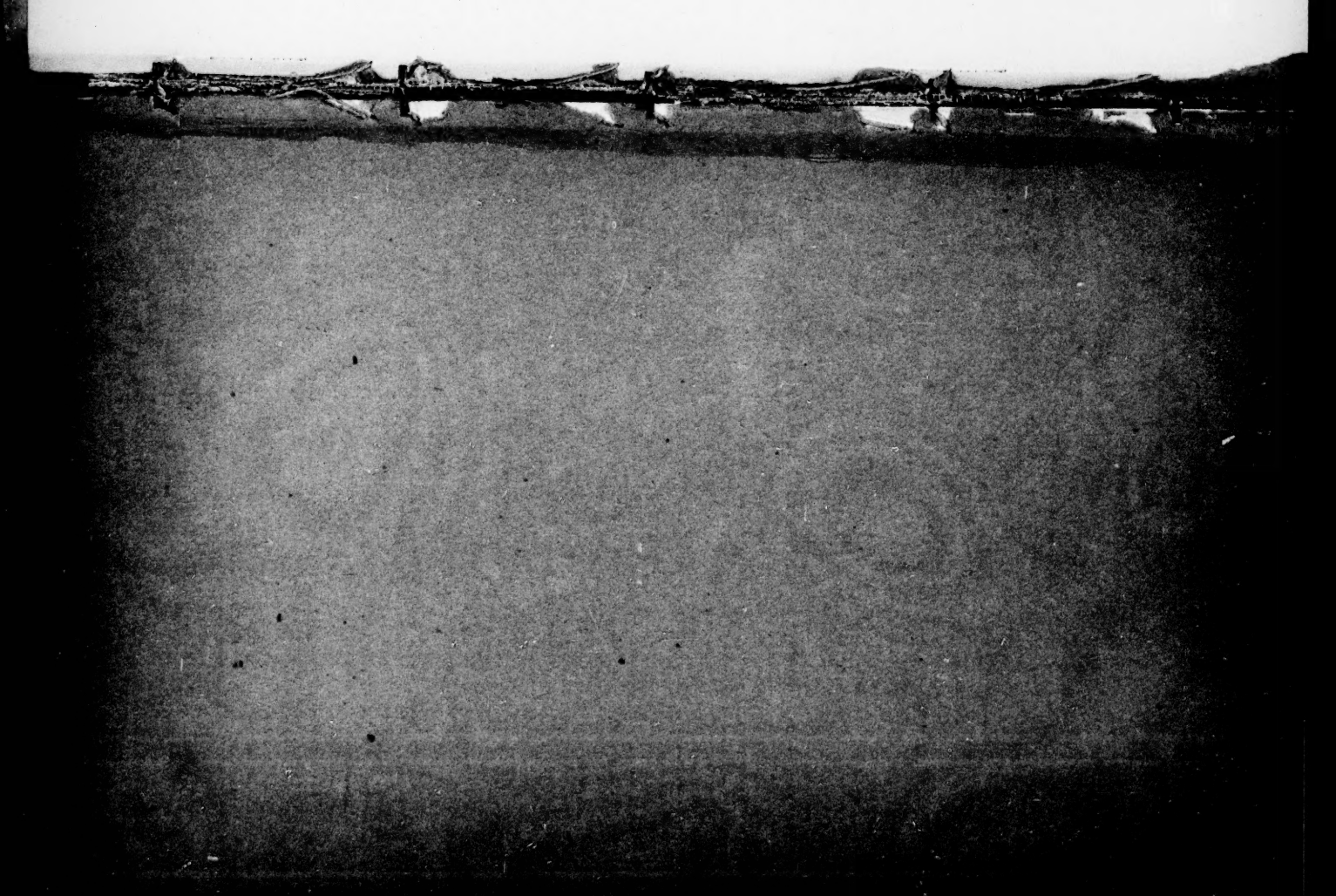
W. H. DODGE, E. P. FERRY, A. B. RICHARDSON, J. N. JACOBSON, MARTIN McGRATH and MRS. MARTIN McGRATH,

DEFENDANTS AND RESPONDENTS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

## BRIEF FOR APPELLANT.

GERALD G. P. JACKSON,
BENJAMIN F. LEE,
Of Counsel.



# Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 273.

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WILLIAM PEREGO,

PLAINTIFF AND APPELLANT,

VS.

W. H. DODGE, E. P. FERRY, A. B. RICHARDSON, J. N. JACOBSON, MARTIN McGRATH and MRS. MARTIN McGRATH,

DEFENDANTS AND RESPONDENTS.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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## BRIEF FOR APPELLANT.

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### STATEMENT OF THE CASE.

This was an action to quiet title brought upon an adverse claim filed by the plaintiff against defendants' application for an United States patent to mineral lands (U. S. R. S. Sec. 2326, as amended ch. 140, 1881, 21 U. S. Stat. 505). The defendants denied the material allegations of the complaint and for further answer alleged title and possession in themselves. They filed no cross-complaint. On May 6, 1891, the record states that the cause was brought on for trial before the court, no mention being made of a jury.

The record further recites that on May 11, 1891, judgment for the defendants was announced (p. 8). On August 18, 1891, the written findings of fact were filed, together with a decree establishing the defendants' ownership of the ground in controversy and quieting their title as

against the plaintiff and perpetually enjoining him (pp. 8-14). No notice of the decree was ever served upon the plaintiff or his counsel, and on the 5th day of August, 1892, the plaintiff, by his attorneys, gave notice of motion for new trial, the grounds for said motion being;

I. Irregularity in the proceedings of the court by which plaintiff was prevented from having a fair trial.

II. Errors of law occurring at the trial, to-wit, the trial of said cause by the court without a waiver of jury by the plaintiff.

III. Because the findings and decree are irregular and void, as appears by the record.

The plaintiff at the same time filed his affidavit that the value in controversy exceeded one thousand dollars, and that he did not at any time orally or in writing, in person or by attorney, waive his right of trial by jury, and that he at all times desired to have the cause tried by jury.

Upon the hearing thereof on the 19th day of September, 1892, the court refused a new trial and denied the motion (pp. 14-17).

The plaintiff then appealed to the Supreme Court of the Territory of Utah, relying, as he now does, upon the following grounds:

That if actions arising upon adverse proceedings for title to mineral lands are triable in equity or as actions to quiet title, the rules of Chancery should govern the proceedings in every particular.

That the action to quiet title is a proceeding in Equity, and as such no provision is to be found in the Utah Code for demanding or waiving a jury and no right to jury trial is given.

That the Utah Code of Civil Procedure is therefore void as concerns actions to quiet title to mineral lands.

That these actions are properly triable at law, the very nature of the case demonstrating that there is a full, adequate and complete remedy at law.

That it was the duty of the court immediately that state of facts appeared at any stage of the proceedings, to decline to contine the cause in Equity and to proceed at law.

That by failing to do so and proceeding in Equity the court acted without jurisdiction.

That the recitals in the record are not such as show a waiver of a jury trial as provided by statute.

That a jury trial could only be waived in the modes expressly provided by statute, such modes being to the exclusion of all other modes, and the statute being a substitute for the common law and in derogation thereof must be strictly followed.

That under the amendment to section 2326, R. S. U. S., chapter 140, Statutes of 1881 (p. 505), a jury must be called in all adverse suits for title to mineral land, the nature of the litigation demanding such a trial.

That under that amendment a jury cannot be waived in a Territorial court.

That a constitutional right cannot be waived by presumption or implication, and can only be waived in the manner expressly provided by the statute.

That the action to quiet title being a proceeding contrary to the course of the common law, no presumptions may be indulged as to the jurisdiction or regularity of the proceedings of a court of general jurisdiction on direct or collateral attack.

The decree and judgment of the trial court was affirmed by the Supreme Court of Utah (Blackburn, J., dissenting p. 19), and the appellant appealed upon the twenty-second day of June, 1893, to this court (p. 20).

## SPECIFICATION OF THE ERRORS.

The specifications of error appear on pages 43-45 of the record. They are fifteen in number, and they will be set forth in this brief in their proper order and separately discussed.

## BRIEF OF THE ARGUMENT.

### I.

The court erred in affirming the judgment and decree of the lower court, thereby depriving the plaintiff and appellant of the right to trial by jury guaranteed to him by the Constitution of the United States.

Article 7, amendments of the Constitution of the United States, guarantees the right to trial by jury in all cases so triable at common law and at the time of framing the Constitution and wherein the sum of twenty dollars is involved.

The complaint shows that the extent of the plaintiff's claim exceeded fifteen acres, and the valuation placed thereon by the United States is five dollars per acre. The decree disposes of the entire claim of the plaintiff, declaring it void.

There is no statute of the United States authorizing actions touching the trial of title to mining lands to be tried in a court of equity, and the organic act of the Territory of Utah conveys no power to the Territory to abrogate the right to trial by jury or to pass any statute providing for trials of cases previously cognizable at law, in Equity, by which the right to demand a jury might be cut off, and the assumption of Equity jurisdiction by a court is a deprivation of that right. A change in the forms of action will not authorize submitting common law rights to a tribunal in which no jury is allowed.

Cooley's Constitutional Limitations,
5th Edition, 507, 410.

Such, however, is the effect of the Statutes of Utah, sections 3350 and 3468, providing for actions to quiet title and declaring in what actions a jury trial shall be had.

The parties were entitled to a jury trial under the seventh amendment of the Constitution of the United States.

Parsons vs. Bedford, 3 Peters 440, 447.
Hipp vs. Babin, 19 Howard, 271.
Grand Chute vs. Winegar, 15 Wallace, 375.
Lewis vs. Cocks, 23 Wallace, 466.
Chamberlain vs. Warburton, 1 Utah, 269.
Donahue vs. Meister, 88 California, 121.
Wolverton vs. Nichols, 119 U. S., 485.
Sedgwick and Waite Trial Title to Land,
Sections 108, 115, 116.

Even if the action is erroneously brought by a plaintiff in equity the court should not assume jurisdiction, and if it does it deprives the parties of the right to trial by jury.

II.

The relief sought in the above entitled cause was of an equitable nature, and the rules of chancery should govern. There being no cross-complaint as provided for in the Utah Code of Civil Procedure, section 3231, the trial court erred in granting the defendants affirmative relief, and the appellate court erred in sustaining the decree of the trial court therein.

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Assuming that the action to quiet title is essentially an equitable action, and that it is merely a modernized form of Quia timet action of ancient days, the court having assumed jurisdiction the rules of chancery pleading should have governed the proceedings.

Smith vs. Rowe, 4 California, 7.

The statutes of the Western States providing for one form of action do not abolish chancery rules, and the statute of Utah, section 3231, Compiled Laws, expressly contemplates the filing of cross-complaints when affirmative relief is sought by a defendant.

The distinctions between law and equity are undoubtedly abolished so far as forms of action are concerned, but the purpose of the abolition was to simplify the complex state of pleading in use before the introduction of codes. The Legislatures never intended to abolish the vital principles of the sciences of equity and common law, and could not do so.

Bliss on Code Pleading, Chapter I., section 10.

Stevens vs. Baker, 1 Washington Territory, 315.

And from the decisions of the courts it will appear such has not been the effect of the statutes abolishing distinctions between law and equity. The main purpose appears to have been to give relief in the speediest manner, to do away with special pleading, and to de-

termine in one suit, wherever possible, matters both cognizable at law and in equity by trying those matters triable at law, at law, and those triable in equity, in equity, even though questions both of law and equity may arise in the course of an action.

Bliss on Code Pleading, section 163.
Sedgwick and Wait Trial of Title to Land, section 184.

If under the ancient system a plaintiff brought an action at law, and on the trial proved a case for equitable relief, or if he filed a bill in equity and at the hearing showed himself entitled to a judgment at law, he must absolutely fail in that proceeding. It was to abolish that arbitrary rule that the codes were enacted. Today under the codes "if a plaintiff brought his action on the theory that it was based upon an equitable right and it turns out to be legal, the trial must be had before a jury, and when a trial takes place before a wrong tribunal the judgment should be reversed and ordered to be tried in the proper place and manner." This was what was sought by the enactment of codes, and not the abolition of the rules that governed and must govern chancery practice as distinguished from common law.

De Witt vs. Hayes, 2 California, 463.
Bonesteel vs. Bonesteel, 28 Wisconsin, 250.
Pomeroy on Remedies, sections 65 et seq.
Pomeroy on Remedies, section 71 and cases cited.
Davis vs. Movis, 36 New York, 569, 571, 572.
Basey vs. Gallagher, 20 Wallace, 670.

It therefore appears that no decree granting defendants affirmative relief could be properly made, except upon a cross-complaint as expressly provided for in the Utah Code of Civil Procedure.

Utah Code of Civil Procedure, section 3231.
Story Equity Pleadings, section 398.
Doyle vs. Franklin, 40 California, 106.
McAbee vs. Randall, 41 California, 136.

Jones vs. Jones, 38 California, 584.
McConnell vs. Smith, 23 Illinois, 560.
Dumont vs. Fry, 12 Fed. Rep. 24.
Quebec Bank vs. Weyand, 30 Ohio State, 126.
Sisty vs. Bebee, 4 Colorado, 52.
Nippel vs. Hammond, 4 Colorado, 211.

Of what use would it be passing statutes requiring cross-complaints or any other pleading if the statute may be practically abolished by the court holding that the loose "for further answer, etc.," will be sufficient.

But we contend that the court has no power to try this cause involving the title to mining lands in equity, nevertheless, having assumed such right and so tried the action, the court should have been governed by the well-settled and time-honored rules of chancery, which have not yet been abolished.

## III.

The court erred in sustaining the jurisdiction of the trial court, in the absence of a statute, to try said cause without a jury, thus depriving the plaintiff and appellant of the right to trial by jury.

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A court of equity in the absence of a statute has no jurisdiction of the action or the subject of the defendants' claim.

2 Story's Equity, 859.
Green vs. Spring, 43 Illinois, 280.

The whole proceedings of Territorial courts, at least in questions of title to mineral lands, must be governed by the statutes of the United States. Those statutes give no jurisdiction to try these cases in equity, and by the amendment to chapter 140, Statutes 1881 (p. 505), it is evident that it was intended that these causes should proceed at law; in fact, there could be no other method if the

United States Statutes were to be regarded. Some authority is claimed for these trials of adverse suits touching title to mineral lands as actions to quiet title by reason of a decision in the Nevada courts in 1874, The 420 Mining Company vs. The Bullion Mining Company, 9 Nevada, 248, in which it was decided that the action to quiet title was applicable in actions for possession of real property where there existed a cloud upon the title, and the action in which this decision was rendered was one arising upon adverse possession under a statute of limitation and not upon adverse proceedings upon application made for patent. At that time chapter 140, Statutes of U. S. 1881, had not been passed, and Nevada was then, at the time of the decision, a State happily, we are told, enjoying greater powers with reference to the right to jury trials than are granted to a Territorial government.

IIII.

The court erred in sustaining the trial court in assuming equitable jurisdiction in a case where there was a full, adequate and complete remedy at law, as appears on the face of the pleadings, and in failing to dismiss the bill and order a trial at law.

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This having been an action between two adverse claimants of mining ground, both holding possessory titles which are legal titles or titles of a legal nature, if it was not sufficiently apparent from the pleadings that there was a full, adequate and complete remedy at law it would necessarily appear on the submission of testimony. It was the duty of the court, whenever it appeared and at whatever stage of the proceedings it appeared that there was such a remedy at law, to dismiss the bill and order an action at law or transfer the case to the law calendar.

Hipp vs. Babin, 19 Howard, 271.
Grand Chute vs. Winegar, 15 Wallace, 375.
Lewis vs. Cocks, 23 Wallace, 466.
Dumont vs. Fry, 12 Fed. Rep. 21.
Killian vs. Ebbinghaus, 110 U. S., 573.
Pomeroy Remedial Rights, section 86 and cases cited.

In Hipp vs. Babin the Court has laid down the rule that relief in cases in equity must be denied "where the remedy at law has been plain, adequate and complete, though the question was not raised by the defendants in their pleadings nor suggested by the counsel in their arguments," which leads us to believe that exactly such a situation as the present one before the court was contemplated and that the rule was enunciated for the guidance of trial judges. The language in Dumont vs. Fry going even farther and to the extent that "even where it is not apparent on the face of a bill, but the bill is framed to avoid the point, if, on looking at the proofs, it appears that the case is one for which there is a plain and adequate remedy at law, it is the duty of the court to decline jurisdiction, etc.," and the same rule is laid down in Killian vs. Ebbinghaus, where a very similar case was before the Supreme Court. In the District of Colorado it is and has been the rule for years to dismiss actions brought in equity where there is a full, adequate and complete remedy at law, and the reasoning of the District Judge at Denver in the case of Boucher vs. The Germania Gold and Silver Mining Company is fully in line with the evident intention of Congress in passing the various statutes governing adverse suits, and with the proper practice, the plaintiff being permitted to docket his case on the law side of the court without prejudice as to the question of time in which the action was commenced after institution of adverse proceedings.

If this class of cases, touching the title to mineral lands, are properly triable as equitable actions to quiet title, then the right to trial by jury can, in every case, be absolutely cut off and safely denied to either party by a judge sitting as a chancellor, and a most cherished portion of the Constitution set at nought; if, on the other hand, they are properly triable at law, the methods of waiving a jury provided by the statute should be strictly followed and no implications, blanket presumptions and loose assumptions indulged in to make of statutes a hollow mockery. But if, as we believe, such actions in Territorial courts must always be tried by a jury under the Amendment of the statute governing adverse claims to mining lands, i. e., Chapter 140, Statutes of U. S., 1881, (p. 505), the sooner the rule is announced and the con-

struction of that amendment determined by this court the better for every community and every individual engaged in mining.

V.

The court erred in sustaining the trial court in proceeding without a jury under the Statutes and Code of Civil Procedure of the Territory of Utah, which do not provide for a jury or for waiver of jury in actions to quiet title to mining ground, and which are therefore null and void as being in contravention of Article 7 of the Amendments to the Constitution of the United States.

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There is no provision in the Utah Code of Civil Procedure, sections 3350, 3468, Compiled Laws of Utah, for a jury trial in actions to quiet title, consequently, no provision for waiver of jury in such actions, and the code is therefore invalid as concerns actions to quiet title to mining lands.

Webster vs. Reed, 11 Howard, 460.
Donahue vs. Meister, 88 California, 121.
Chamberlain vs. Warburton, 1 Utah, 269.
Tabor vs. Cook, 15 Michigan, 322.

In Chamberlain vs. Warburton the Supreme Court of the Territory has laid down the rule that the right to trial by jury cannot be abrogated by Legislature, etc., etc.; therefore, if this cause was tried in equity under the section of the Utah Code providing for actions to quiet title, the right to trial by jury was taken from the plaintiff and the judgment should be void. The action to quiet title is an innovation of recent date, the result of newly-settled and rapidly-growing districts and cities, where real estate speculation in building lots was so great that titles were frequently improperly searched before large interests were acquired and jeopardized, and to ease such difficulties and arrive at a speedy termination of such conflicts the Legislatures of newly-settled communities passed these acts; but it can hardly be pretended that the

various Legislatures intended to furnish rules to govern proceedings under adverse claims to titles for mining lands for which there already existed laws of the United States, and which statutes were, in many instances, in existence and force long before the necessity for easy methods to straighten out clouds upon titles to building lots had arisen. We do not believe the Legislatures intended to or contemplated the attempt to extend the action to quiet title over mining litigation arising under possessory titles and under the adverse proceedings provided for in R. S. U. S., Section 2326, but they certainly have caused trouble and annoyance by such a blanket act as the action to quiet title statute usually is. Even in conflicts arising over the title to building lots a purely legal question may be involved, but if this statute is valid an action may be brought thereunder, and no provision being made for a jury in causes of that kind the right to a jury may be entirely and safely denied by a judge sitting as a chancellor to determine an alleged or stated cloud on a title, where a full, adequate and complete remedy might and frequently does exist at law.

## VI.

The court erred in deciding that the right to trial by jury is or may be waived by going to trial without objection in a suit brought to quiet title, there being no provision by which plaintiff and appellant could have either demanded or waived a jury trial in such actions under the statutes of the Territory or in any form of equity suit.

A defendant in equity "cannot waive a jury by failing to demand it, because no mode is provided by which any such demand can be made."

Tabor vs. Cook, 15 Mich., 325.

We now call attention to everything that there is contained in the record which can possibly have any bearing upon the question of the waiver of a jury trial.

The District Court for the Third Judicial District of Utah Territory was a court having jurisdiction in equity as well as at law.

The finding of the Court forms part of the judgment roll under the statute of Utah (Compiled Laws, section 3413). It contains the following recital (p. 8): "This cause

duly coming on for trial on the merits before the court without a jury, and the court having heard the pleadings, evidence, and arguments of the respective counsel, the court now makes and files the following findings of fact and conclusions of law."

There is also a notice of motion for a new trial, upon the ground, among others, of

"Second—Errors of law occurring at the trial, to-wit, the trial of said cause by the court without a waiver of jury by the plaintiff" (p. 14).

There is also an affidavit by the plaintiff which states, among other facts:

"Third—That he did not at any time, orally or in writing, in person or by attorney, waive his right of trial by jury in said suit, and that he at all times desired to have the same tried by jury" (p. 15).

There is also a similar notice of motion to the one above referred to (p. 16).

There is also an order overruling said motion for a new trial (p. 17).

The only recital, therefore, from which there can be a possible inference of waiver of a jury trial, is that above quoted from the Finding of the Court, and this recital we propose to show, has not the slightest tendency to support the contention of the appellees that a jury trial was waived.

The Utah practice, as is well known, is derived from the New York Code. Under the practice in the New York Supreme Court, which is the court of original general jurisdiction at law and in equity, the common law cases presenting issues of fact go to what is called the "Circuit" to be tried by a jury, and the equity cases go to what is called the "Special Term," where they are tried by a judge without a jury, the witnesses being examined in open court as in a jury trial.

The recital in the Finding of the Court below above quoted would not, under the New York practice, have the slightest tendency to indicate that a jury had been waived in an action at law. In fact, the approved form of decision of the Supreme Court, sitting in equity (i. e., findings, with directions for judgment) by a judge at Special

Term, would be as follows (2 Abbott's New Practice and Forms, p. 847, Form No. 1611):

"At a Special Term of the Supreme
"Court, held in and for the County
"of ——, at the County Court
"House, in ——, in said County, on
"the — day of ——, 18—.

"(Title of Action).

"The issues of fact coming on to be tried by the court "at Special Term held by the undersigned without a jury "and having been tried on the day of 18 "and the allegations and evidence of the parties having "been heard; now, after hearing A. T. for the plaintiff "and Z. T. for the defendant, and due deliberation having "been had, I decide and find as follows:

"FINDINGS OF FACT.

"1.

"CONCLUSIONS OF LAW.

"1.

"I accordingly direct judgment for," etc.

(Here follows a statement of the equitable relief given.)

The record in the case at bar indicates that the trial took place on the equity side of the court. Neither party was called upon to demand a jury, and neither party could have demanded a jury.

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## VII.

The court erred in the decision that a jury trial may be waived by failure to demand or by going to trial without a jury, such manner of waiver not being of the modes provided by statutes of the United States and of Utah, such modes as provided being to the exclusion of all other modes, and the statute must be strictly followed.

In the action to quiet title which, as we are aware, is essentially an equity action, there is no provision for the waiver of a jury, and there is no right to demand a jury in equity causes, how, then, could a jury have been waived when one could not have been demanded, or, if

demanded in an equity cause, could it have been obtained except at the discretion of the court? The only actions in which a right to a jury trial is given in Utah are specified in

Section 3350, Compiled Laws of Utah,

and no provision is made for jury trial in causes to quiet title, and participating in a trial of such an action before the court where no right to demand, and consequently none to waive a jury is given, could not constitute a waiver of a constitutional right.

Tabor vs. Cook, 15 Michigan, 322, 325.
Chamberlain vs. Warburton, 1 Utah, 269.
Wolverton vs. Nichols, 119 U. S., 485.

If an action is erroneously brought by a plaintiff's attorney in this manner, is not the court to be relied upon as a safeguard that the rights of parties shall not be carelessly sacrificed. Section 3378 of the Compiled Laws of Utah expressly enacts the manner by which juries may be waived, and we contend that the modes provided by this statute are the only ones by which this right may be abrogated. "Implication" or "failure to demand" are not methods laid down in the statute by which a jury may be waived, and if in fact a jury was ever contemplated in this cause, why is there nothing in the record, the recitals of the decree or the findings of fact which intimates a waiver? The express language is "tried before the court" "without a jury." If a jury had been waived the findings of fact would not have stated that the cause had been tried "before the court without a jury," but would have contained the additional words indicating affirmatively a waiver. In all civil suits at law a jury may be waived, but only in the manner prescribed by statute; the waiver must appear affirmatively and not by implication. The parties might, perhaps, under the statute, have authorized the court to try the issue, but had they done so it ought to have appeared on the record.

Archer vs. Shellman, 1 Scammon, 553 (S. C., Ill.).
Smith vs. Polack, 2 California, 92.
Biggs vs. Lloyd, 70 California, 448.
Treading vs. Wilder, 12 Nevada, 108.
Hodges vs. Easton, 106 U. S., 412.

Baylis vs. Travellers Ins. Co., 113 U. S., 321.
Proffatt on Jury Trial, Section 111.
Flanders vs. Tweed, 9 Wallace, 425, 431.
Chamberlain vs. Warburton, 1 Utah, 269.
Utah Code of Civil Procedure, Section 3378.
Swasey vs. Adair, 88 California, 182.
Utah Code of Civil Procedure, Section 3350.

In Biggs vs. Lloyd the rule is particularly well set forth, and the California statute is the same as that of Utah. The Supreme Court of Utah, however, in the case at bar, cites some four authorities to sustain the contention that going to trial before the court without objection waives a jury, but we do not find that the authorities selected warrant the conclusion. Under the United States Statute it is provided that in courts of the United States a jury may be waived by a written stipulation filed with the clerk, but it does not provide that it may be done orally in open court and entered in the minutes. In at least one decided case the Supreme Court suggests that the statute was probably passed in order that a jury might be waived in vacation and the court be thus advised in advance of the term as to what cases were for a jury. It is well known that in the courts of the United States jurors are called from an extensive region and often live at great distances from the places of sitting of the court, and jury service is attended with much inconvenience to the citizen and no little inconvenience to the court, and hence the wisdom of the statute which may cause the court to be advised in advance of the jury cases. The Utah Code of Civil Procedure provides that a jury may be waived by filing such written stipulation and also by oral consent in open court entered in the minutes. We contend that those modes are prescribed to the exclusion of all other modes, and the authorities cited would appear to amply sustain that position. The case of Kearney vs. Case in 12 Wall, 275, cited by the court, must be considered in connection with the United States Statute on the subject which does not provide for oral waiver entered in the minutes.

The court, in its opinion, also cites Hitchside vs. Caruthers, 82 California, 523, which, upon even a casual examination, will be found to be not in point. Haws vs.

Clark, cited as Haules vs. Clark, 84 California, 272, in the opinion of the court, was a case where a jury was waived in open court, but the waiver was not at the time entered in the minutes. Counsel for the defendant, at a subsequent day, demanded a jury, but the court held that it had previously been waived and ordered the waiver to be entered in the minutes nunc pro tunc.

We go farther and assert that a jury was not even considered, this cause was brought erroneously as an equity cause, the trial judge failed in his duty to order a trial at law, there is nothing in the record to show that a jury was even contemplated, and everything to indicate that the whole proceeding was conducted in equity under a statute to quiet title, which we shall further on argue is void and improper in this class of actions. If, as a matter of fact, this cause was tried in equity, which is the only inference to be gathered from the record, there having been a full, adequate and complete remedy at law under the amendment of R. S., section 2326, chapter 140, Statutes of U. S., 1881 (p. 505), the whole proceeding would appear to be void.

All statutes in derogation of the common law must be strictly construed and followed.

Brown vs. Barry, 3 Dallas, 365, 367.
Cole vs. City of Muscatine, 14 Iowa, 296.
Cooley's Constitutional Limitations, 6th Ed., 75 and note.

And we contend that statutes passed as substitutes for and in contemplation of practice cognizable, formerly of common law, must also be strictly followed and construed.. If at common law a jury might have been waived by implication and inference, and subsequently the Legislature passes a statute defining special modes by which a jury could be waived ignoring methods known to the common law, we believe such a statute should be strictly construed and followed, and no other mode of waiver permitted than the modes designated in the statute.

The common law is abrogated by a statute upon all points, rights and remedies provided for by such statute

Broom's Legal Maxims, page 650.
Expressio unius est exclusio alterius.
Expressum facit cessare tacitum.
Coke on Littleton, 210. a

It is said by Coke, in his Commentary upon Littleton, that the law shall never seek out a person when the parties themselves have named one. Shall, then, the court seek out a method for waiving a jury when the Legislature has named the methods and there is no ambiguity as to the wording of the statute?

The contemplation of the Legislature as to the methods of waiving a jury are well set forth in section 3350 of the Compiled Laws of Utah, which specifies in which actions a jury trial shall be had, "unless a jury trial is waived, or a reference is ordered as provided in this code," clearly indicating that the Legislature intended that there should be no presumptions as to the waiving of a Constitutional right.

## VIII.

The court erred in presuming a waiver of jury and in deciding that it must appear affirmatively from the record that a jury was not waived.

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There is nothing in the record from which a waiver of jury may even be inferred.

Hodge vs. Easton, 16 U. S., 412.

County of Madison vs. Warren, 106 U. S., 622.

It has repeatedly been held by this Court and the other Federal courts that statements in the records "jury is waived," "both parties in open court having waived a jury and agreed to trial before the court," "jury was expressly waived," and kindred entries and recitals in the record, do not constitute a waiver according to the United States Statute governing waiver of juries. Upon this this court has repeatedly refused to consider matters of evidence, holding parties to a strict construction of the statute and refusing strong language like the above words to even constitute a waiver of jury by implication or presumption.

Hodge vs. Easton, 106 U. S., 412.

County of Madison vs. Warren, 106 U. S., 622.

U. S. vs. Carr, 61 Fed. Reporter, 802 (C. C. A., 8th Circuit).

Baylis vs. Travellers Ins. Co., 113 U. S., 321.

Why, then, in this action should the mere words "tried before the court without a jury" be held to constitute a waiver by implication or presumption? The statute of Utah is quite as explicit as the Federal Statute, the provisions for waiver plainly indicated therein; implication and presumption are not methods stated in the law, and evidently were not intended to be.

Section 3350, Utah (Code of Civil Procedure) Compiled Laws.

The recitals in the findings of fact in the decree and conclusion thereof quieting and confirming the title to the premises in controversy in the defendants, of themselves tend only to the presumption that the action proceeded entirely in equity, that a jury and the waiver of a jury were never considered, and to negative the presumption of the Utah court. The Utah court practically decides, under the guise of an imperfect record, that it was the duty of the appellant to show affirmatively that a jury trial was not waived.

If this was a case for a jury, and upon this point, judging from the opinion of the Supreme Court of Utah, there seems to be no dispute, it is incumbent upon the respondents to show by what authority the court tried it "without a jury," and that must, we further contend, appear affirmatively from the record upon which they rely, because it would then be a jurisdictional fact. If it is contended that it is sufficient if the formal waiver of jury appears anywhere in the papers or proceedings in the case, it is clearly incumbent upon the respondents to supply that portion of the record in order to sustain the judgment. We protest against loose presumptions and implications being entertained to deprive a litigant of a Constitutional right, especially when those presumptions and implications are based on language or words which only tend to negative any such presumption or implication. And particularly so when no such presumptions and implications are contemplated by statute. Had the Territorial courts followed the course which has been taken by this court in the cases cited, construing what language is sufficient to form a compliance with the Revised Statutes as to waiver of jury, they could hardly have reached the conclusion that the recitals in this record

constituted a waiver of jury under the statutes just as explicit as that construed so often by this court.

The case of Kearney vs. Case, 12 Wall, 275, as before suggested, should be read in connection with the United States Statute, which does not provide for oral waiver of jury entered in the minutes; but doubtless had the Federal statute provided for such a method of waiver and the statute had been disregarded, the decision in that case would have been of another complexion.

## IX.

The court erred in deciding that the judgment of the trial court should be sustained when the record does not show jurisdiction in the trial judge to hear or determine said cause. The judgment roll shows that the cause was tried "without a jury," but fails to show that jurisdiction was conferred upon the trial judge by waiver of a jury in any of the modes provided by statute, or that there was any waiver of jury whatever.

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In the opinion of the Supreme Court of Utah it is decided that the judgment roll alone can be considered and, in effect, that it is necessary for the appellant to show that the trial by jury was not waived in a statutory manner before his right to trial by jury can be considered. This is manifestly erroneous, and imposes upon the appellant the necessity of proving a negative. But, nevertheless, the objection that a judgment is not authorized by the pleadings can be taken upon the judgment roll alone, and error may be assigned upon the judgment roll alone.

Frevert vs. Henry, 14 Nevada, 191.

Mattingly vs. N. W. Virginia Railroad, 158 U. S., 53.

In this last case the record failed to show jurisdiction in the court, and the appeal was dismissed; this objection was apparent in the record and was not urged or suggested by counsel; the court of its own volition noticed the point, and it was held that the record should affirmatively show jurisdiction.

Appeals have been dismissed on this ground and without motion by counsel; in the case of a dismissal of an appeal for this neglect a great hardship might be worked, but in the case of a reversal of a decree rendered by a judge in whom the record and the judgment roll alone fail affirmatively to show jurisdiction, it seems there would be no hardship and possibly the obtaining of substantial justice.

If this judgment roll, which we are told must alone be regarded, discloses error, and want of jurisdiction is, we take it, grave error, it cannot be assumed that the error was cured by some matter which does not appear therein.

Bedan vs. Turney, 99 California, 652.

Now, the Utah appellate tribunal has decided that only the judgment roll can be considered, and in the same breath they refuse to consider the minutes of the court, which might clear up all doubt on the error assigned if it was indeed cured. In other words, the missing link they so much want is lying under the eyes of the court, but must not, on the ground of technicality, be observed. The judgment roll alone, however, we believe, discloses the error of want of jurisdiction. The court presumes that error cured by some matter the plaintiff failed to incorporate in the record in the technical method, but presuming that the matter would cure the apparent want of jurisdiction, it still refuses to observe it.

What does the remarkable statement, "this imperfect record," mean? The minutes and the affidavit may be improperly in the record and therefore to be disregarded, the record then would be the judgment roll, and if that is imperfect the judgment of the lower court is void and should be reversed, especially when the matter in which the imperfection consists could, by the rules of the court, have been inserted by those most interested in sustaining the judgment, at the expense of the appellant.

If the contention of the appellant is well founded that a jury cannot be waived under the statutes of the United States in this class of cases, the objection may be raised on the judgment roll alone and at any time. This would also be the case where certain essential facts must appear to give jurisdiction and the waiving of a jury, if one may be waived, would become a jurisdictional fact,

which must necessarily appear affirmatively in the judgment roll upon which respondents rely, or in the record, and if the record was purposely made up to avoid showing these essential facts, the rules of the Supreme Court of Utah provide for the supplying of such portions of the record as are necessary to sustain a judgment, by the respondents. Why, then, do not respondents supply affirmative evidence of the waiver of the jury in this cause, if anywhere in the judgment roll, minutes or proceedings such could be found?

X.

The court erred in disregarding the minutes of the trial court and the affidavit on motion for new trial by the plaintiff, which show affirmatively that a jury was not waived.

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The Statutes of Utah, sections 3646, 3648 and 3404, govern the record on appeal. Now, suppose a motion should be made on the minutes of the court and affidavits, and the attorneys moving desire to abandon everything but the judgment roll and the affidavit, it could hardly be said that under these statutes he must make a statement of the case to cover the affidavit; this is a record of the court, and there being no provision for identification, should be sufficiently identified when transcript on appeal is made up by the clerk of the court and by him certified as true and correct copies of the papers and records of his court. Under Rule 2 of the Supreme Court of Utah, the certification can be made by the attorneys or clerk, and the language of the rule is so plain as not to lead one to suspect that it was intended to mean an identification or certification being necessary by any one else. The court should be bound by its own rule and the manifest meaning of the words therein used.

Hanson vs. McCue, 43 California, 178.

The rules of the Supreme Court, as already stated, also provide for additions to the record by the respondent when it is found that the one provided by the appellant was imperfect.

These respondents were in the position of maintaining a judgment attacked, and complained of an imperfect record on appeal, there being a judgment roll only on which to appear before the Appellate Court. Now, if in any record or proceeding in the trial court it was possible to show that the question of calling a jury, waiving a jury, or of granting, demanding, or otherwise dealing with the jury right was considered, why was it that the respondents, upon whom the burden lies to maintain the judgment, did not produce the proof thereof and incorporate it in this imperfect record under the rule of the Supreme Court of Utah.

But from the opinion it would appear that for some purposes the minutes and affidavits were properly in the record, and for others not. In the Utah court's opinion it is set forth that "the attorneys for both parties were present during the entire proceeding, and it does not appear that any demand for a jury trial was made, or that any objection or exception was made at any time during the trial against the right of the court to try the case "without a jury." How did the court find all this out? Not from the judgment roll, because that information does not appear there, and as the proceeding was contrary to the course of common law, we cannot presume regularity or even verity of the recitals upon direct or even collateral attack. The court then to have discovered that no demand, etc., was made, must have taken a glance at least at these minutes improperly in the record. What, however, would it have availed a party to except or object to a trial before the court in an equity action, and is there any necessity to demand a Constitutional right? A demand would have availed the party nothing if made, as no jury is provided for in actions to quiet title under Utah statutes.

Compiled Laws of Utah, section 3350, 3468.

The minutes must have been regarded to discover all this, because the judgment roll is silent on these points, and if the minutes were properly regarded for this purpose, why was not the affidavit also regarded to negative any such presumption as was evidently entertained?

But we find the opinion continues: "This objection (i. e., the jury question, etc.) is raised for the first time in this court," and yet immediately below follows a long

discussion as to whether or no the affidavit and minutes, which show that the question was raised in the court below, should be considered. The court directly contradicts itself, saying a question was not raised, and almost in the same breath saying it was raised, by referring to the papers, etc., which prove that it was.

In the opinion it is also stated that with the imperfect record it was unnecessary to discuss the question as to whether the plaintiff was entitled to a jury trial. The failure to show a waiver according to statute is an error of law, we believe, and, if an error of law, it needs no bill of exceptions, statements, or anything beyond the judgment roll, that being the evidence of the judgment, would be a perfect record alone, and the Utah court holds that they may consider the judgment roll.

Error of law apparent on the face of the record needs no bill of exceptions.

Moline Plow Co. vs. Webb, 141 U. S., 616.

It is to be regretted that the Supreme Court of Utah should have thought it unnecessary to discuss the question as to whether appellant was entitled to a jury trial under the circumstances shown. It is a grave Constitutional and jurisdictional question, this one of the right to jury trial, and the surrender of it, and merits more than a passing notice such as was evidently awarded it by the Utah court.

## XI.

The court erred in presuming jurisdiction of the court and regularity of the judgment in a proceeding conducted contrary to the course of the common law, the record not disclosing authority for the judgment.

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The action to quiet title is a proceeding contrary to and unknown to the Common law, it is the creature of a Statute. There are no presumptions in support of the judgments even of Superior Courts of general jurisdiction not proceeding according to the course of the common

law, and the jurisdictional facts must appear affirmatively or such judgments may be attacked collaterally as well as directly.

Neff vs. Pennoyer, 3 Sawyer, 274.
Galpin vs. Page, 3 Sawyer, 93.
Galpin vs. Page, 18 Wallace, 350.
Commonwealth vs. Blood, 97 Massachusetts, 540.
Prentiss vs. Parks, 65 Maine, 562.
Haywood vs. Collins, 60 Illinois, 333.
Johnson vs. Von Kettler, 84 Illinois, 316.
Cissell vs. Pulaski, 10 Fed. Rep. 893.
Martin vs. Barbour, 34 Fed. Rep. 708.
Morse vs. Presby, 5 Foster, (25 N. H.) 302.

And courts of superior jurisdiction so acting stand upon the same footing as regards presumptions of regularity and verity as do courts of inferior jurisdiction.

The presumtion as to regularity of proceedings and verity of the record applies only in cases of collateral attack, and not in cases of direct attack, as on an appeal.

McKinley vs. Tuttle, 42 California, 571,

and in this case we are directly attacking a judgment, and to attack a judgment directly the judgment roll is a sufficient record.

We call particular attention to the rule as stated by Mr. Justice Field in Galpin vs. Page, 3 Sawyer, at page 110.

The findings and decree in this case were not according to the course of the common law, and the Judge acted only as an arbitrator, no authority to so act is shown affirmatively by implication, neither can it be presumed. In an early case upon the subject Chief Justice Taney says: "The findings of an issue of fact by the court upon the evidence is altogether unknown to a common law court, and cannot be recognized as a judicial act, and if by agreement of parties the questions of fact in dispute are submitted for decision to the Judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator."

Campbell vs. Boyreau, 21 Howard, 226.
Cooley's Constitutional Limitations, 390, 391.

But where is there in this record any authority to act as arbitrator? This position appears to be sustained by

Bond vs. Dutsin, 112 U. S., 604.
Flanders vs. Tweed, 9 Wallace, 430.
Rogers vs. U. S., 141 U. S., 555.
Graham vs. Bayne, 18 Howard, 62.
Borgher vs. Ins. Co., 103 U. S., 90.

If the Court assumed jurisdiction to try the cause as an action to quiet title it acted contrary to the course of the common law, and no presumption should be entertained, that the words "tried before the court without a jury" constitute a waiver of a Constitutional right.

## XII.

The appeal taken by the Plaintiff and Appellant is from a judgment and decree against his right to the possession of mining ground by reason of a right conferred by a statute of the United States. The Court erred in proceeding to trial of the right to possession of mining ground under Statutes of Utah which are in contravention of the provisions of Chapter 140, Statutes of 1881, amendatory of Section 2326, Revised Statutes of the United States, which are that a jury must determine the right to possession in suits for mining grounds, the Utah Statutes providing for no jury trial, and the Appellate Court erred in sustaining the trial court therein.

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The chapter 140, Revised Statutes of 1881, clearly contemplates a jury in all cases of title to mining lands, and the provision in that chapter, that if neither party proves title to the ground in controversy the jury shall so find, necessarily demands the calling of a jury in all cases arising under Section 2326, where possessory titles are in question. The first requisite in a mining application and contest arising thereon is that each claimant shall be a citizen of the United States, next that they

shall each have performed the necessary annual labor on their respective conflicting claims, and again that they shall have made their locations in accordance with the Statutes. Now, in every mining contest it is not possible to know at the time the trial commences that both parties have complied with the law in these respects, and at any time after the case has been commenced and is in progress "before the court without a jury," it may appear that neither party has complied with the provisions of the Statute, or some of them are essential to give them a right to go into court. (The case of Jackson vs. Roby, 109, U. S., 440, is an example of this kind. The court, however, called a jury in compliance with the Statute.) If, then, this should appear in a trial before the Court, how can the jury decide that neither party is entitled to the ground in controversy as the chapter 140, Statutes of the United States of 1881, demands? This Statute was passed at the urgent suggestion and solicitation, we believe, of Judge Moses Hallett, the Judge of the Federal District Court at Denver, who has probably had more experience in the trial of titles to mining lands than any other District Judge in the country; we believe his reason for desiring such an act, compelling the trial by jury was to prevent the frauds that might and frequently were and are perpetrated in securing title to mineral lands. The Statute of Utah, providing for actions to quiet title, making no provision for a jury trial or for the demand or right to demand a jury in such trials, is plainly in conflict with the provisions of the chapter 140, Statutes of the United States of 1881.

We contend from the conclusions reached in the cases hereafter cited that Congress in passing the Amendment referred to intended to insure the trial by jury of title to mining lands arising upon adverse suits, and that such cases were to be regarded as cases purely at law and not in Equity.

Wolverton vs. Nichols, 119 United States, 485.
Gwillim vs. Donnellan, 115 United States, 45, 50.
Morrison's Mining Rights, Pages, 343 and 222, 7th Edition
Jackson vs. Roby, 109 United States, 440.
Manning vs. Strehlow, 11 Colorado, 454.

Becker vs. Pugh, 9 Colorado, 589.
Rosenthal vs. Ives, 2 Idaho, 243.
" " " 12 Pac., Rep. 904.
Burke vs. McDonald, 13 Pac. Rep., 351.
McGinnis vs. Egbert, 8 Colorado, 54, 55.

## XIII.

The Court erred in sustaining the trial court in proceeding without a jury to determine facts and decide the right to possession of land in which the United States is an interested party. As such interested party the Government has provided a mode by which its title may be divested, and has prescribed that a jury shall determine conflicting rights and to whom patent shall be granted.

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In actions based upon adverse claims to mining lands the Government is an interested party.

Morrison's Mining Rights,
7th Edition, Pages 343 and 222.
Last Chance Mining Co. vs. Tyler Mining Co.,
157 U. S., at Page 694.
U. S. vs. M. K. & T. Ry., 141 U. S., 358.
Gwillim vs. Donnellan, 115 U. S., 50.
Jackson vs. Roby, 109 U. S., 440.
Manning vs. Strehlow, 11 Colorado, 454.
Becker vs. Pugh, 9 Colorado, 589.
Rosenthal vs. Ives, 2 Idaho, 243,
12 Pac. Rep. 904.
Burke vs. McDonald, 13 Pac. Rep. 351.
McGinnis vs. Egbert, 8 Colorado, 54, 55.
Wolverton vs. Nichols, 119 U. S., 485.

In all of these cases the reasoning tends to the conclusion that the Government is an interested party (though not named in the pleadings, of course,) to the extent that it should know who is entitled to the possessory title to the land in controversy as against the Government title and to patent therefor. It may on any trial

under adverse proceedings be demonstrated during the course of the litigation that neither party to the suit is properly entitled to the patent therefor by reason of a failure to comply with the requirements of the Act of Congress, in which event the Government is interested to the extent that the land should return to the public domain.

In keeping with this the Congress of the United States passed various Statutes, the latest being the Act known as Chapter 140, Statutes of 1881, amendatory of Section 2326, Revised Statutes of the United States and evidently for the purpose of clearing up all doubt as to the proper form of action and procedure on these adverse suits, about which form of action and procedure there was, prior to 1881, some conflict of opinion, frequently leading to errors and mistakes, of which the bringing of this action was an example, from which the court could and should have saved the litigants by insisting upon a jury trial in conformity with the Statute and refusing to assume jurisdiction in any other way, and especially as a judge in equity when a full, adequate and complete remedy lay at law.

XIV.

The Court erred in deciding that a jury could be waived in a trial to determine the right to possession of mining ground in a Territorial Court, such proceeding being contrary to the Statutes of the United States.

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Our contention is, First, that a trial by jury was not waived, and Second, that under the mining laws of the United States the parties to the suit could not waive a jury and confer jurisdiction or give authority to the court, the United States being a quasi or interested party to the extent that it would not part with its title to the property except to the party properly entitled to purchase and patent the same, and has provided that the jury shall find that as against the United States neither of the parties would be entitled to purchase and patent, a contingency

that may occur in the course of any proceeding of this nature and which cannot be foreseen at the time juries are waived.

The opinion dismisses the whole question of right to jury trial, waiver thereof, and the right to waive a jury in a Territorial Court with the statement that with an imperfect record before them they do not "consider it necessary to discuss the question as to whether appellant was entitled to a jury trial under the circumstances shown." The judgment roll constituted the circumstances shown, and the judgment roll surely could not be an imperfect record. Leaving the question of the papers said to be improperly in the record, the judgment roll alone is enough upon which to raise the objection, and if that is imperfect, the contention of the appellant would seem to be sustained. We contend that in a Territorial court the Statute of Congress is paramount, and cannot in any way be abrogated by Territorial laws or customs. That Statute has declared that a jury shall determine facts which necessitate the calling of a jury in every case of trial of title to mining ground under adverse proceedings, and no jury can be waived unless it be in States where the control of mining lands is largely turned over to the State governments. The general government has provided the manner and by what proceedings its title to mining land shall be divested, and the courts are controlled thereby and can proceed in no other way.

## XV.

The Court erred in deciding that a Constitutional right could be waived in any manner not provided by Statute, or in any manner contrary to the modes expressly provided for such waiver by Statute.

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The right to a jury trial is a constitutional right, and a constitutional right cannot be waived by implication or in any manner not provided by the Statute.

The waiving of a jury in a cause cognizable at law is a jurisdictional fact which must appear affirmatively in the judgment roll or record, and cannot be waived by

implication. In Mexican National Railway Company vs. Davidson, 157 U. S., 201, no question of jurisdiction was raised at the trial, both sides put in evidence, and the question of jurisdiction was raised for the first time on appeal. It was held that a question of jurisdiction could not be waived. Now, in the cause before this Court the question of a waiver of jury is in no manner or place referred to in the judgment roll, the recitals therein tending only to the conclusion that a jury was not considered, it would therefore be permitting a jurisdictional question to be waived and ignored in the loosest manner possible to hold that the recitals in this record constitute a waiver of a constitutional right and jurisdictional necessity.

In conclusion it may be urged by the Respondents as it already has been with much ardour and with expression of grave doubt as to the effect upon the course of justice, that to permit a reversal of this decree would be to trifle or permit trifling with the Court, but the fears appear to us to be absolutely groundless, for had the court properly interpreted and administered the law, observing not only the Statute of Utah, but the laws of the United States, paramount as they must be in such cases, therecould have been no trifling or chance therefor but as designated by us, no assumption of jurisdiction on the part of the court. It is plain there could have been no trifling, as it is now gravely feared there may have been, if the Judge by his own failure to observe the laws governing this particular class of actions had not invited and induced error.

If these actions to quiet title are to be held as applicable to adverse proceedings touching title to mineral lands, then, as the law is in the Territories the right of trial by jury may always be abolished at the election of a plaintiff by bringing his action in equity to quiet title. We believe, however, that chapter 140, Statutes of the United States of 1881, gives the right of trial by jury in actions under adverse claims arising upon applications for patent, and provides for a full and complete adjudication.

If under this code, practice, this cause proceeded in equity when there was a full, adequate and complete

remedy at law, the judgment and decree so entered should be reversed and the cause sent back for trial by jury on the law side of the court.

## CONCLUSION.

The judgment should be reversed and the cause remanded with directions to grant a new trial by jury on the law side of the court.

GERALD G. P. JACKSON,
BENJAMIN F. LEE,
Of Counsel.

Office Supreme Court U. S.
FILED.
MAY 7 1896
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 273.

WILLIAM PEREGO,
Plaintiff and Appellant,

*vs.*

W. H. DODGE, E. P. FERRY, A. B. RICHARDSON, J. N. JACOBSON, MARTIN McGRATH and Mrs. MARTIN McGRATH,
Defendants and Respondents.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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## STATEMENT SUPPLEMENTARY TO ARGUMENT FOR APPELLANT.

In my argument in reply to Senator Brown on Friday (May 1st), I should have made a statement which I think I omitted. It is to the following effect:

That the provisions of Sec. 2326, U. S. R. S., as amended by Chap. 140, Statutes of 1881 (Vol. 21, p. 505), are ancillary in their nature and are designed to relieve the officials of the Land Office from the performance of judicial duties, and that this consideration supports our view that the United States is so far an interested party that it is not in the power of the parties to an action brought under these enactments to waive the jury trial contemplated by the statute.

New York, May 5, 1896.

B. F. LEE,
Of Counsel for Appellant.

Office Supreme Court U. S.
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# Supreme Court of the United States.

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## BRIEF AND ARGUMENT FOR RESPONDENTS.

ARTHUR BROWN,
WILLIAM H. DICKSON,
*For Respondents.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

# Supreme Court of the United States.

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W. H. DODGE, E. P. FERRY, A. B. RICHARDSON, J. N. JACOBSON, MARTIN McGRATH, AND MRS. MARTIN McGRATH, RESPONDENTS.

## BRIEF AND ARGUMENT FOR RESPONDENTS.

### STATEMENT OF FACTS.

This is a suit brought in pursuance of the provisions of the statute of the United States, section 2326, providing for adverse claims where either party applies for a United States patent for mining claims. The defendants in this cause had applied for a patent, the plaintiff under the statute filed his adverse claim in the land office, and upon that adverse claim brought this suit. The statute provided that it shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession.

"Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings except the publication of notice and making and filing of the affidavit thereof shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

Part of section 2326.

The form of the action is not provided by this statute, whether it shall be in equity or a proceeding at law in the nature of ejectment or in some special proceeding based specifically upon this statute. The rulings have generally been that either ejectment or a bill in chancery would lie, according to the circumstances of the case, and that the statute did not intend specifically to prescribe the form of special actions, although, of course, it is purely a statutory action.

Under this statute the plaintiff in this case, who has appealed here, filed his complaint in the Territory of Utah, in which Territory the code of practice obtains, and the different forms of action are merged as far as it is possible into one; but in actual practice actions at law are jury causes and actions in equity are not jury causes. The complaint was in the form usual in that Territory, and, as the respondents insist, is substantially a bill in chancery or as near an imitation of one as is usual in code States. It alleges the title of plaintiff to his mining claim, which was called the Perego, describes it, stating the date of location, the existence of a vein, and the other necessary jurisdictional facts entitling him to a decree in chancery founded upon such title. The

complaint then alleges that the defendants have made application for a United States patent in the land office to certain mining claims known as the Mayflowers No. 4 and 5, and that they have wrongfully surveyed the said Mayflower claims so as to conflict with the claims of plaintiff, and describing the area in conflict, alleging in addition thereto that the notice of the said application for patent of defendants had been published, and that within the sixty-day period of publication the plaintiff filed in the land office adverse claim, and that within thirty days thereafter this suit was brought. The plaintiff then prays that he may be adjudged (in the language of the statute) to be entitled to the right of possession and to the patent for the said property. Quoting accurately the language (Record, page 3, folio 6):

"That the plaintiff is the owner and lawfully in and entitled to the possession of the last above described premises, the area in conflict between the said Perego mining claim and the alleged consolidated claim of William H. Dodge *et al.*, upon alleged Mayflower No. 4 and Mayflower No. 5 Lode locations and the lodes therein and quieting and confirming plaintiff's title thereto and possession thereof; that the defendants have no title to or right of possession of said conflict area or the lodes therein or any part thereof; that the defendants be restrained, pending the action and upon trial, perpetually from entering in or upon said conflict area or the lodes thereon or any part thereof or mining in or extracting any ores or minerals therefrom, and from in any way interfering with the possession thereof; also that the plaintiff have all other and further proper relief, with costs of suit."

The defendants answered the said complaint, denying the affirmative allegations and affirmatively alleging the necessary jurisdictional facts of their location, claiming a valid location of the Mayflowers Nos. 4 and 5, and that the proper assessment work had been done, vein discovered, and other things necessary to constitute a valid location, and praying at the end of their answer judgment that the defendants be

adjudged to be the owners and entitled to the possession of the said Mayflower No. 4 and the Mayflower No. 5 lodes and mining claims, including the said conflict area, and for all general and proper relief, and for costs of suit. The cause was brought to trial on this complaint and answer without any question being raised as to the nature of the suit, whether at law or in chancery, and it was tried before the court without a jury, no intimation being made by plaintiff or defendants either that a jury was desired or was permitted in such a case. After the trial the court filed its opinion and decision in favor of the defendants. Findings of fact were filed finding the claims of the defendants valid and that of plaintiff invalid as against defendants, and that the defendants were entitled to the patent. The decree was affirmative in form, stating the rights of the defendants to a patent for each of the said claims. The findings and decree were filed and entered on the 18th day of August, 1891. On the 5th day of August, 1892, nearly a year thereafter, the plaintiff, by another attorney (his original attorney having been the Hon. Parley L. Williams, of Salt Lake City), Gerald G. P. Jackson, filed in court a notice of intention to move to set aside the verdict for the reasons stated at Record page 14, to wit:

1st. Irregularity in the proceedings of the court, by which the plaintiff was prevented from having a fair trial.

2d. Errors of law occurring at the trial, to wit, the trial of said cause by the court without a waiver of jury by the plaintiff.

3d. Because the findings and decree are irregular and void, as appears by the record.

It was accompanied by an affidavit that the value of the property exceeded one thousand dollars, and that the plaintiff, by himself or attorney, had not waived his right to a trial by jury, and that he received no notice of the decision of the court in the cause. (See Record, folios 26–28.) On the 15th of August the same attorney filed notice of appeal

to the supreme court of Utah. . Upon the first notice of intention of motion no statement or bill of exceptions or record of the trial was ever filed, as required by the statutes of Utah.

"If the motion is to be made upon a bill of exceptions and no bill has already been settled, as hereinbefore provided, the moving party shall have the same time after serving of the notice to prepare and obtain a settlement of a bill of exceptions as is provided after the entry of judgment or after the receiving notice of such entry, as provided by section 526, and the bill shall be prepared and settled in a similar manner. If a bill of exceptions has been already settled and filed, when the notice of motion is given, such bill shall be used on the motion.

"If the motion is to be made on a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof, may allow, prepare a draft of the statement and serve the same or a copy thereof upon the adverse party."

Compiled Laws, 1888, sec. 3402.

"The judgment-roll and the affidavits or bill of exceptions or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the court, and in that case the judgment-roll and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal."

Compiled Laws, 1880, sec. 3404.

The record disclosed that at different times the matter of new trial was brought up and finally was dismissed. No statement or bill of exceptions was subsequently filed. The appeal was perfected and brought to a hearing before the supreme court of Utah, the decision of which is found in the Record at page 21. From that decision the plaintiff appeals to this Court and states what he considers the specification at page 2 of his brief.

Under the foregoing circumstances the defendants insist that the plaintiff was right in planting a suit and calling it a bill in chancery. The subject-matter was such and the nature of the relief was of that character that it required a bill in chancery to settle and determine the rights of the parties to this litigation. A mere suit in ejectment or an action at law under such circumstances would have been inefficient to finally dispose of the matters involved. The contention was not the actual possession. That was a mere secondary and evidentiary fact connected with the issue prescribed by statute, which is "the right of possession." Whether we consider the statute requires a bill in the nature of one to quiet title or as special in pursuance of the statute, the relief must be specific and not general. A mere general judgment would do the plaintiff no good if he succeeded and would not be what would be desired by the defendants. In all these cases the court itself is acting in merely an ancillary capacity to the land office. Except for the legislation in the specific statute referred to, it would be the duty of the land office to determine in the first instance who should be entitled to the patent, the applicant or the adverse claimant. This section, however, refers the discussion of that question to a court of competent jurisdiction. To be of any use in the land office, the decree in all cases must define exactly the rights of the plaintiff and defendant. In other words, it must be specific. It is not an action for damages. It is not an action for possession. In its very nature it is an action in equity, and so it has always been treated in actual practice in the mining States. The form of procedure and the order of proof in the large majority of cases probably conforms to that defined and laid down in the Golden Fleece case, 12th Nevada.

In the cases that have come to this Court I think almost without exception the cases have been in the form of

equitable procedure. Take, for instance, the case of Rose *vs.* Richmond, reported in the 17th Nevada, 44, appealed and determined here, 114 U. S., 578; see also M. Company *vs.* Bullion M. Company, 9 Nevada, 248. These are two samples, for the mining authorities are full of these cases of adverse claims, nearly all of which are in the form of bills in equity, and the nature of the relief is such that they ought all to be in the form of a bill in equity.

Not only does the nature of the action require a bill in equity as distinguished from a proceeding in ejectment, but the form of the complaint in this cause was directed to and purposely intended for a bill in chancery. The prayer of relief as given above has no word or no hint that it was intended as an action at law. The final words, that "plaintiff shall have other and proper relief," are indicative of the purpose and intent of the pleader to bring this action into chancery.

The conduct of the parties in going to trial without objection and disposing of it as an equity cause, it is claimed, and will be claimed by the appellant here, is not a waiver of their right to a jury of what is said to be a constitutional right. The respondents here insist that it is too late to raise the question on appeal, and it was too late at any time after the merits had been inquired into, as to whether the defendant should be entitled to a jury or not:

"If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a speedy and adequate remedy at law. The objection should be taken at the earliest opportunity."

This is a quotation from Daniels, found in—

Reynes *vs.* Dumont, 130 U. S., 395.
Wylie *vs.* Cox, 15 How., 420.
Kilborn *vs.* Sunderland, 134 U. S., 514.
Freeland *vs.* Wright, 154 Mass., 493.
Landregan *vs.* Pippin, 94 Cal., 467.
Evans *vs.* Goodwin, 132 Pa. St., 136.
Book *vs.* Justice Min. Co., 58 Fed., 828.

It is alleged in the assignments of error and intimated in the argument that there is a constitutional right to a jury under the seventh amendment to the Constitution. The constitutional right to a jury applies only to that class of cases where either party had the right to have a jury at the time the Constitution was passed. Mere statutory remedies which have been created and brought into existence since the Constitution was adopted are not within its protection.

This is a statutory action in a certain sense, and as such, of course, would not be within the constitutional purview; in another sense it is in the nature of an action to quiet title. The plaintiff alleges that he is in possession; that he has the right of possession; that the defendants set up an adverse claim which was wrongful, and that the defendants are attempting to make their adverse claim good by filing their proceedings in the land office. It possesses all the peculiarities of a bill to quiet title. In either view the plaintiff was not constitutionally entitled to a trial by a jury. The plaintiff claims that a jury is recognized by the United States statute of March 3, 1881 (Supplement to the Revised Statutes, page 324): "That if in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find and judgment shall be rendered according to the verdict." This statute it will be contended in argument and by the assignments of error that all these cases be tried by a jury. It must be remembered in the first place that this statute is not the Constitution of the United States; that it in no manner enlarges, explains, or affects the provisions of the seventh amendment. If the right to a trial by a jury exists by the Constitution, the statute neither takes away nor adds to it. If the right of trial does not exist by the seventh amendment, this statute could not affect the constitutionality of the proceedings of any court. Mere reading the statute shows that the intent was not to change the methods of trial. The object of the

statute, which must be the turning point of its construction—the remedy to be effected by it, was that the Court should determine in a certain class of cases that neither party had the right to the property. In other words, the United States, being substantially, though not nominally, a party to all these proceedings, would have the right to a decree in its favor if neither party established his right. The jury is but an incidental matter. Had it been the intention of Congress to provide that this class of cases should be tried by a jury, then the legislation would have been and must have been direct, and the statute would read that in all cases arising under the adverse claims, defining it either by section or the nature of the action, the trial must be by a jury. In the absence of such provision there can be no intention of Congress to require absolutely a jury trial. But even if the statute had required it (a jury trial), any statutory right may be waived by the parties. No language could be put into the statute so strong but that the right to a jury trial could be waived by the conduct of the parties. When the case is one of a remedial proceeding essentially of an equitable character, there can be no objection to the exercise of that form of jurisdiction.

Gormley *vs.* Clark, 134 U. S., 348.

The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances.

Kilborn *vs.* Sunderland, 130 U. S., 514.

All these questions are examined and decided in the very complete case of Book *vs.* Justice Mining Company, 58 Fed., 828, a case substantially the same as the one that we have on trial. Judge Hawley reviews the different questions that are involved in this case and very ably decides them

as they have been decided in the supreme court of Utah on this question.

Under all those circumstances, of the waiver and of the nature of the action, this plaintiff cannot now be permitted to say that his own complaint was erroneous when he brought it and filed it in the court of chancery. He cannot be permitted to say that his conduct and that of his attorney who tried the case was improper, when he proceeded of his own volition without a jury to dispose of this case and to try it as an equity case. This is the first example to be found in the books where a plaintiff brings a suit into a court of justice and persistently complains of error in that the court has entertained it. He files his suit in a court of chancery and he complains now that somebody did not object to his proceeding in the court and insist that he should have a jury trial. He goes so far that in the fourth assignment of error, page 43, he complains that "the court erred in assuming jurisdiction in his cause when there was a full, adequate, and complete remedy at law," and would like upon appeal to demur to his own complaint.

In his brief the appellant goes even further. I quote at page 16:

"If, as a matter of fact, this cause was tried in equity, which is the only inference to be gathered from the record, there having been a full, adequate, and complete remedy at law under the amendment of R. S., section 2326, chapter 140, Statutes of U. S., 1881 (p. 505), the whole proceeding would appear to be void."

If the whole proceeding was void, then, of course, this appeal ought to be at once dismissed, because he is here in pursuance of the statute which required him to "commence proceedings in a court of competent jurisdiction to determine the question by right of possessiou" within thirty days after filing his claim in the land office. If he did not file a valid legitimate proceeding to determine this question within

thirty days, he has no case in court. He now says that he did not and alleges it here as grounds of relief, that his own proceedings were void.

It is next contended that plaintiff was entitled to demand a trial by jury. This is predicated on the theory that the cause of action pleaded was a legal cause of action.

The plaintiff alleged that he was in the possession of the premises in controversy and sought to determine defendant's adverse claims thereto. It would then be a suit in equity unless the act of Congress in pursuance of which it was instituted has provided otherwise.

Holland *vs.* Challen, 110 U. S., 15.

In the case of Mining Co. *vs.* Mining Co., 9 Nev., 248, where the question seems to have been first raised, the Court say with reference to the mining acts of Congress:

"The object of the law, as we understand it, was to require parties protesting against the issuance of a patent to go into the State courts of competent jurisdiction and institute such proceedings as they might under the different forms of action therein allowed elect and there try the rights of possession to such claim and have the question determined. The acts of Congress do not attempt to confer any jurisdiction not already possessed by the State courts, nor to prescribe a different form of action. If the parties protesting are in possession of the ground in dispute, they can bring their action under No. 256 of the civil practice act, or if they have been ousted from the possession they could bring their action of ejectment, and in either action the rights of possession to such claim could be finally settled and determined."

See also Houtz *vs.* Gisborn, 1 Utah, 173.

But this question need not be decided in this case, because if the plaintiff was entitled to a jury he waived his right by going to trial before the Court without objection.

If the minutes of the trial court and plaintiff's affidavit are not properly in the record, then the appellant has failed

to show to this Court that he did not waive a jury trial "by oral consent, in open court, entered in the minutes."

But respondents contend, on broader grounds, that there was such waiver.

The plaintiff, without objection, went to trial before the court. He will not be permitted to experiment on the decision of the court, and, finding it against him, allege that the judgment is erroneous because of an irregularity to which he purposely refrained from calling the attention of the trial court, as to which he asked no ruling and took no exception. It would seem elementary that even if plaintiff had demanded a jury trial and the court had denied it, the ruling of the court could only have been reviewed in a civil case on an exception. The plaintiff is in no better position because he made no such demand.

The act of Congress of March 3, 1865, in its fourth section, enacted that—

"Issues of fact in civil cases in any circuit court of the United States may be tried and determined by the court without the intervention of a jury whenever the parties or attorneys of record file a stipulation in writing with the clerk of the court waiving a jury."

It will be perceived that this statute was fully as strong as the Utah statute.

In Kearney *vs.* Case, 12 Wall., 275, the Supreme Court had occasion to consider the statute above quoted. The judgment in the case contained the following:

"This cause came up for trial—J. D. Rouse and Elmer & King, for plaintiffs; G. L. Bright and Bradford, Lea and Finney, for defendants—when, after hearings the pleadings, evidence, and argument, the court considering the same, it is ordered, adjudged, and decreed," etc.

The Court, by Mr. Justice Miller, says:

"Is this Court at liberty to infer from the entry a waiver of the right to a jury trial? When we consider the cases

already cited, in which such a waiver has been implied, and that the right to have a jury when a party demands it is so universally known and respected, we think that it is almost necessary inference, when a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, and must be held in this Court to the legal consequence of such a waiver."

Mr. Hayne, in speaking of the California statute from which the Utah statute is taken and of the California cases, says:

"The cases, therefore, are not decisive of the question. Every consideration of justice and fair dealing, however, requires that a party should not be permitted to take the chances of a trial by the court and, when he finds that the decision is against him, object for the first time that the trial should have been by jury. It can hardly be contended that a judgment rendered upon a trial by the court had in the absence of an express waiver of a jury is absolutely void. If not void, it must be irregular merely, and if merely irregular, it is difficult to perceive why the party should not be required to object to the course taken, as he is required to do in the case of other irregularities."

Haynes on New Trial and Appeal, pp. 120, 121.

The recent California cases have taken the same view of the question.

Connear *vs.* Geist, 73 Cal., 176.
Hitchcock *vs.* Caruthers, 82 Cal., 523.
Haws *vs.* Clark, 84 Cal., 272.

Nor is there anything in the cases quoted by appellant adverse to the position taken here.

In the case of Smith *vs.* Pollock, 2 Cal., 92, it will be observed that the appeal was taken from an order of reference. The party did not wait until after the trial before making the objection, but appealed directly from the order of reference and had proceedings upon the order stayed.

In Hellman *vs.* Williams, 70 Cal., 448, and in Treading *vs.* Wilder, 12 Nev., 108, the defendant demanded a jury when the case was called for trial and excepted to the refusal by the court of such demand.

This is also true of the cases of Bayliss *vs.* Travellers' Ins. Co., 113 U. S., 321; Chamberlain *vs.* Warburton, 1 Utah, 269, and Biggs *vs.* Lloyd, 11 Pac. R., 831.

In Ware *vs.* Nollinger, 35 Ill., 376, it appears that the action was tried by the court without a jury after the defendant's attorneys had withdrawn from the case, and, so far as the case shows, in the absence of the defendant.

The only case cited among all the list of those found in appellant's brief on the subject of jury trials where a jury trial in an action to quiet title has been deemed important or necessary is the case of Donahue *vs.* Meister, 88 Cal., 121. In that case the plaintiff filed a bill to quiet title, the same as this. The defendant filed an answer alleging that the plaintiff had ousted him (the defendant) of possession; that he was entitled to possession as a legal right, and he demanded a jury to determine that legal right; and the court held in that case the plaintiff could not by rushing into a court of chancery deprive the defendant of his right to a jury trial, and quotes cases to prove it. But the court expressly say, and are careful to repeat, that they do not intend to make that principle applicable to any other state of facts. That while the plaintiff had the right to choose his own forum, he had no right to deprive the defendant of his legal privilege of a jury. Here the plaintiff seeks the forum, and of course is bound by his conduct, as he would have been in the California case. The defendant acquiesced in the same forum, and does not now complain that resort was had to a court of chancery.

It is next claimed that no affirmative relief could be given for defendants because there was no cross-complaint, and the plaintiff claims that his complaint should have been simply dismissed. To that we reply that the decree is in effect a

mere dismissal of his complaint. The affirmative statement of the rights of defendants might, if it was to be used between the parties, be treated as mere surplusage. It amounts to nothing more than a dismissal of the cause.

This proceeding being one auxiliary to the land office, the land office has a right under the statute to have it referred to the court to determine it. The parties had taken the necessary steps to invoke the jurisdiction of the court to have a specific decision as to what the court held on the subject of the controversy between the parties, so that whichever way the cause may go it is the duty of the court to report to the land office, whose assistant and aid it is, the exact facts and steps taken by it.

Following the practice laid down in the Golden Fleece case, 12 Nev., each party is a plaintiff in this suit. The defendants were plaintiffs when they filed their application for patent in the land office; the adverse claimants are plaintiffs when they brought a suit in the court. The defendants must affirmatively prove the existence of their location, their right of location, their assessment work, and their right to possession; the affirmative facts must be found. It is not necessary that this should be restated in the form of a cross-complaint. The code practice is to simplify the proceedings, that the entire controversy may be disposed of in one issue. A restatement of the same issue in the form of a cross-complaint would have added nothing to the issue in this case. The cross-complaint necessarily should prescribe some new and addition matter. Mere copying an answer is unnecessary in a cross-complaint. However, the character of a pleading is not determined by its name, but by its nature and by the facts that are pleaded in it. Tested by that rule, this answer might be considered as a cross-complaint. It is true the defendants might not have been able to take the default of the plaintiff unless it was called a cross-complaint, and thus the plaintiff had been admonished that he was required to answer, but if the facts are sufficiently alleged and properly al-

leged, which entitled the defendants to affirmative relief, they are entitled to it whether they name it "answer" or "cross-complaint" or leave it unnamed at all.

Mills *vs.* Fletcher, 100 Cal., 142–149.
Miller *vs.* Luco, 80 Cal., 261.
Meeker *vs.* Dalton, 75 Cal., 156.
Wilson *vs.* Manderson, 55 Cal., 5.

The affidavit for a new trial cannot be considered here. The practice of Utah follows that of California, and requires that a notice of intention to move for a new trial shall be served within ten days after the decision of the court or notice thereof. It is true the plaintiff says that he had no notice of the decision; but his attorney was Parley L. Williams, and Williams does not testify that he did not have any notice; that proof must be necessary and is necessary to perfect any proceeding for a new trial; but what is of more importance is that no bill of exceptions or statement has been made nor any attempt at any, and therefore there is no appeal from any decision denying a new trial if one had been rendered.

The respondents here submit a motion to dismiss this appeal for the reason that the court has no jurisdiction. There is no Federal question involved. The record shows by a large preponderance of proof that the property is not worth five thousand dollars and was not worth that at any time during this controversy. Nothing in the records or pleadings indicate the value of the property. Richard Campbell, Thomas A. Clark, Leonard Phillips, Charles Barnicott, Charles E. Street, Michael F. Clark, William Perego, and Michael Fitzgerald testify it is worth more than the amount in controversy. On the other hand, the defendants, James Quinn, a miner of large experience and superintendent of neighboring claims; Richard Williams, foreman of another neighboring claim; John McSorley, superintendent in a prominent mining company;

Matthew Connolly, Edward Grose testify it was not worth $5,000, in addition to David Keith, Hickey, and Thomas Kearns, who testify as to the reasons why it was not worth $5,000. The affidavit of Keith and Hickey would disclose, connected with that of Perego, the real situation of affairs. This claim lays near valuable mining property. At the time of the controversy originally arising it was supposed that a valuable vein might run through there; subsequent development has shown that it probably never carried any ore of any great consequence or value. At the time the affidavits were made it was apparent to Keith and Kearns, and even to Perego, that that property was not worth any great amount.

Therefore the respondents, in connection with the argument of said cause, file a motion to dismiss the appeal in consequence of the amount.

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